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NO. 92-206

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES
OF AMERICA

OCTOBER TERM, 1991

AMERICAN FAMILY MUTUAL
INSURANCE COMPANY,

Respondent.

v.

BRADLEY ALAN PURDY, D.L. and J.L.,
and D.L. as Guardian ad Litem
of C.L. and A.L., Minors,

Petitioners.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH DAKOTA

PETITION FOR WRIT OF CERTIORARI

Donald P. Knudsen
Counsel of Record for
Petitioners D.L., J.L.
and D.L. as Guardian ad
Litem of C.L. & A.L.,
Minors
GUNDERSON, PALMER,
GOODSELL, & NELSON
P.O. Box 8045
Rapid City, SD 57709
(605) 342-1078

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a rule of law which creates an irrebuttable presumption that is not necessarily or universally true, and which operates to deprive an insured of insurance coverage, deprives the insured of property without due process of law in violation of the fifth and fourteenth amendments to the Constitution of the United States.

2. Whether a rule of law which creates an irrebuttable presumption that all criminal sexual offenders intend or expect to injure their victims denies equal protection of the laws in violation of the fourteenth amendment to the Constitution of the United States.

3. Whether a rule of law which effectively amends and expands an insurance policy exclusion in a manner which operates to deprive insureds of insurance coverage which would otherwise be available impairs the

obligations of contracts between insurers and insureds in violation of the Constitution of the United States, article 1, § 10, cl. 1.

LIST OF PARTIES

American Family Mutual Insurance Co.
120 North Phillips Avenue
P.O. Box 1157
Sioux Falls, SD 57101

Bradley Alan Purdy
519 W. 940 N. #15
Provo, UT 84604
--or--
3508 Cypress Court
Rapid City, SD 57701

David Lerback
Jani Lerback
Christian Lerback
Andrew Lerback
P.O. Box 8045,
Rapid City, SD 57709-8045

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REFERENCE TO THE OFFICIAL REPORT OF THE OPINION DELIVERED IN THIS CASE

American Family Mutual Insurance Co. v. Purdy, 483 N.W.2d 197 (S.D. 1992).

JURISDICTIONAL STATEMENT

Petitioner respectfully requests the court to issue a writ of certiorari to the Supreme Court of South Dakota to review its decision in the case of American Family Mutual Insurance Co. v. Purdy, 483 N.W.2d 197 issued March 25, 1992. By order dated April 29, 1992, the Supreme Court of South Dakota denied rehearing of the cause on appeal. This court has jurisdiction to review the Supreme Court of South Dakota's decision by writ of certiorari pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property,

> without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. V (emphasis added).

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1 (emphasis added).

> No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

U.S. Const. art. I, § 10 (emphasis added).

STATEMENT OF THE CASE

This case involves the sexual molestation (fondling of genitals) of two

young boys by a very close family friend. The boys, Christian and Andrew, and their parents, David and Jani, brought a civil lawsuit seeking compensation for their damages against the perpetrator, Bradley Alan Purdy ("Purdy"). Purdy tendered the defense of the matter to his parents' homeowner's insurance carrier, American Family Mutual Insurance Co. ("American Family").

American Family undertook the defense in the principal action under a reservation of rights. American Family simultaneously commenced a declaratory judgment action seeking a judgment that American Family had no obligation to defend Purdy against any of the claims set forth in Lerbacks' complaint filed in the principal action, and that American Family had no duty to indemnify Purdy for any judgment which might be rendered against him in the principal action.

A trial of the principal action resulted in a verdict in favor of the Lerbacks in the amount of Ninety-two Thousand Four Hundred Dollars ($92,400). A trial of the declaratory action resulted in a verdict in favor of the Lerbacks and Purdy concluding that American Family was obligated to defend and indemnify Purdy in the principal action.

American Family appealed the declaratory judgment to the Supreme Court of South Dakota. The Supreme Court of South Dakota reversed the trial court and held that there was no coverage under the homeowner's insurance policy and that American Family had no duty to defend or indemnify Purdy in the principal action. American Family Mutual Insurance Company v. Purdy, 483 N.W.2d 197 (S.D. 1992). By so doing, the Supreme Court of South Dakota created a judicial rule of law which holds that in all cases of criminal sexual

contact, perpetrators intend or expect to injure their victims. Id. at 201.

The Purdy decision was rendered March 25, 1992. A Petition for Rehearing was denied April 29, 1992. Copies of the Purdy Decision and the Order Denying Rehearing are located in the Appendix at pp. 90-109, 136-37.

Review is necessary because the Purdy decision creates a rule of law which violates the Constitution of the United States. This case raises important federal questions because the same constitutional violations made by Purdy are being committed by approximately twenty-five jurisdictions throughout the United States. Constitutional violation of such magnitude mandates Supreme Court analysis to extinguish its proliferation and to protect citizens' constitutional rights.

David Lerback, Jani Lerback, and David Lerback as Guardian Ad Litem of Christian

Lerback and Andrew Lerback, minors, respectfully petition the court to issue a writ of certiorari for the following reasons: first, the Supreme Court of South Dakota has decided a federal question in a way that conflicts with decisions of the Supreme Court of the United States; and second, the Supreme Court of South Dakota has decided important questions of federal law which have not been, but should be, decided by the Supreme Court of the United States. Rules of the Supreme Court of the United States, Rule 10.1.(c).

A. MATERIAL FACTS

David Lerback and Jani Lerback, husband and wife, have two sons: Christian and Andrew. Christian Lerback was born September 21, 1973 and was between the ages of eight and twelve during the time he was sexually molested by a close family friend, Bradley Alan Purdy ("Purdy").

Andrew Lerback was born December 27, 1978. Andrew was between the ages of three and seven during the time he was sexually molested by Purdy.

Purdy was born February 8, 1964. Purdy himself had been sexually molested as a young man. Purdy was between the ages of eighteen and twenty-two during the time he sexually molested the Lerback boys. Purdy sexually molested Christian and Andrew at various time throughout the summers of 1982 through 1986.[1]

Lerbacks became acquainted with Purdy in 1982. Purdy had assisted the Lerbacks moving their residence from a local air force base into Rapid City. They quickly became close friends. In fact, the Lerbacks considered Purdy their adopted son/brother. Purdy would frequently visit the Lerbacks' home. He would often spend

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[1]No molestation occurred during the summer of 1984 because Purdy was in Germany on a church mission.

time playing with the Lerback children (Christian, Andrew, and their sister, Jennifer).

From time to time, David would be at work and Jani would have to leave the house to run various errands. Under such circumstances it would not be uncommon for Jani to leave the children in Purdy's care for a short period of time.

Unbeknownst to David or Jani, Purdy would take advantage of such opportunities to sexually molest Christian and Andrew. During the period from 1982 through 1986, Purdy sexually molested Andrew Lerback on at least fifteen occasions, and Christian at least three times.

The sexual molestations consisted of Purdy fondling the boys' genitals. There was no evidence that Purdy ever engaged in oral or anal sex with the boys.

The sexual molestations abruptly concluded one day when Jani told Andrew that she was going to be leaving him in Purdy's care for a few minutes while she

took her daughter, Jennifer, to baseball practice. Andrew objected and began acting strangely -- he began talking baby talk. When Jani inquired why he did not want to stay with Purdy, Andrew answered: "him plays with my private parts, Mom."

Purdy was criminally charged with felony sexual contact with a child under the age of sixteen in violation of SDCL 22-22-7. At the time of his arrest, Purdy was evaluated at a local mental health facility and was diagnosed as a homosexual pedophile. Purdy plead guilty to the charge and was ultimately given a suspended imposition of sentence after serving a short jail term and paying a small fine.

B. PROCEDURAL HISTORY

David and Jani Lerback, on their own behalf, and David Lerback as guardian ad litem for Christian and Andrew, commenced a civil lawsuit against Purdy seeking compensation for damages they had suffered, and would suffer, as a result of Purdy sexually molesting the boys.

Since Purdy was a resident of his parents' household during the summers when the sexual molestations had occurred, Purdy was insured under his parents' homeowner's insurance policy. Purdy tendered the defense of the civil lawsuit ("principal action") to the homeowner's insurance carrier, American Family.

American Family provided a defense for Purdy in the principal action under a reservation of rights. Simultaneously, American Family commenced a declaratory judgment action, seeking a declaration that American Family had no obligation to defend or indemnify Purdy from Lerbacks' claims.

American Family's action was based solely[2] upon exclusions contained in the homeowner's policies[3] which excluded

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[2] American Family does not contend that any other policy provision precludes coverage.

[3] Because the molestation occurred over a period of several years, more than one homeowner's policy was issued to Purdys by American Family; however, the intentional injury exclusion was worded identically in each policy.

coverage for any bodily injury ". . . which is expected or intended by any **insured.**" The policy defines "insured" as:

> **Insured** means **you** and **your** relatives if residents of your household.

"You" is defined as the person whose name appears on the declarations page. Purdy's parents' names are listed on the declarations pages of the policies at issue in this case.

American Family claimed that Purdy had intended or expected to injure the Lerback boys. Therefore, American Family argued, coverage was excluded the policy's intentional injury exclusion.

Purdy's deposition was taken as part of both the principal action and the declaratory judgment action. During the deposition, Purdy was specifically asked whether he had intended to cause any injury to the Lerback boys. Purdy testified that he had not intended to cause them any harm. Deposition of Bradley Purdy, September 13,

1988, p. 58, lines 3-4; p. 61, lines 18-19. (App. 1.)

Similarly, Purdy was asked whether he had expected that the Lerback boys would suffer some degree of emotional distress as a result of the sexual molestation. Purdy testified that he had not expected they would be injured. Deposition of Bradley Purdy, p. 61, line 20 through p. 62, line 5; see also p. 73, line 11 through p. 75, line 23. (App. 1-6.)

Purdy testified that the molestations were an impulsive/compulsive act. Deposition of Bradley Purdy, p. 63, lines 2-9; p. 76, line 15 through p. 77, line 15; p. 81, lines 1-18. (App. 2-8.) He said he performed the acts in an effort to understand his own sexual molestation experience and gave no thought to the effect his acts might have on the children. Id. at p. 63, lines 6-9. (App. 2.)

In October, 1988, American Family moved for summary judgment. American Family based its motion on case law which

held that in cases of sexual abuse, an intent to injure or an expectation that injury would result from the sexual abuse could be inferred as a matter of law.

In response to American Family's motion, the trial court permitted Lerbacks' counsel to obtain an independent psychological evaluation of Purdy to investigate Purdy's intentions and expectations at the time the boys were molested. As part of that evaluation, Purdy was tested on August 11, 1989, using the Minnesota Multi-phasic Personality Inventory. See Affidavit of Dr. Fred McCall-Perez dated January 2, 1990. (App.9-11.) Lerbacks retained an expert, Dr. Fred McCall-Perez, Ph.D., who interpreted the MMPI results as well as other available relevant psychological information about Purdy. Id. The test results indicated that Purdy suffered from impulse control difficulties. Under stressful circumstances, this condition could cause

Purdy to act out in a sexually inappropriate way. Id.

Dr. McCall-Perez submitted an affidavit in opposition to American Family's summary judgment motion. Id. He opined that Purdy did not intend to injure the Lerback boys at the time he sexually molested them. He explained that Purdy suffered from psychological conditions which caused Purdy to believe the sexual molestation incidents were expressions of love which would not injure the Lerback boys. Id.

Dr. McCall-Perez's affidavit in combination with Purdy's testimony, raised a genuine issue of material fact concerning Purdy's intentions or expectations at the time of the sexual molestations. Therefore, on May 1, 1990, the trial court denied American Family's summary judgment motion. See Letter Opinion from the Honorable Jeff W. Davis dated May 1, 1990. (App. 12-15.)

On December 3, 1990, American Family once again moved for summary judgment. The trial court denied the motion by Order dated December 17, 1990. (App. 16-18.)

A trial of the principal action was held January 23-24, 1991. During the trial, Dr. McCall-Perez was present in the courtroom and was able to observe Bradley Purdy. One of the things Dr. McCall-Perez observed was when Purdy requested the court for permission to take the stand and offer testimony regarding his own personal sexual molestation experiences. Purdy wanted to tell the jury that he had been sexually molested as a child and had not suffered adverse effects. Purdy wanted to use this testimony as evidence to prove that since he had not suffered adverse effects as a result of the sexual molestation, the Lerback boys had not suffered, and would not suffer, any adverse effects. Of course, the trial court refused Purdy's request to present this

type of evidence. (T.T. pp. 223-24) (App. 19-21.)

The principal action concluded with a verdict in favor of the Lerbacks awarding total damages in the amount of Ninety-two Thousand Four Hundred Dollars ($92,400).

The declaratory judgment action was tried to the court on January 25, 1991, the day following the trial of the principal action. American Family's case-in-chief consisted of the introduction of the applicable insurance policies, the amended complaint from the principal action, and transcripts of the testimony given at the trial of the principal action by Christian and Andrew Lerback. American Family called David Lerback to testify regarding the number of incidents of sexual molestation. American Family then rested its case.

To defend against American Family's reliance on the intentional injury exclusion, Lerbacks called Dr. McCall-Perez to testify with respect to Purdy's intentions or expectations at the time of

the sexual molestations. (A.T. pp. 11 - 58) (App. 22-47). Dr. McCall-Perez opined that Purdy had not intended to injure the Lerback boys. (A.T. pp. 11-17) (App. 25-29). Dr. McCall-Perez based this opinion on several grounds, including the results of Purdy's MMPI which revealed that Purdy's personality was inconsistent with that of a person who would intend to harm another person. Id.

Dr. McCall-Perez also opined that Purdy did not expect to injure the boys by sexually molesting them. (A.T. pp. 17-25) (App. 29-44). Dr. McCall-Perez's opinion was supported by his observations of Purdy attempting to testify in the principal action that he himself had not been adversely effected by his own sexual molestation as a young boy. Id. Dr. McCall-Perez testified that this demonstrated Purdy's belief that the boys would not be injured, and therefore, he did not expect to injure them by sexually molesting them.

To rebut Dr. McCall-Perez's opinions, American Family called Dr. Michael McGrath, Ph.D. (A.T. pp. 59-73) (App. 47-54.) Dr. McGrath's testimony consisted solely of reasons why he believed Dr. McCall-Perez did not have a sufficient foundation to reach his opinions. Id.

On cross-examination, Dr. McGrath conceded that if the information was available which he believed would be necessary in order for Dr. McCall-Perez to reach his opinions, that information could in fact support Dr. McCall-Perez's opinions. (A.T. pp. 68-73) (App. 52-54.) Dr. McGrath testified that it was equally probable that Purdy did not intend to injure the Lerback boys, and that Purdy did not expect that they would be injured by the sexual molestation. Id.

American Family did not introduce any positive evidence whatsoever to prove that Purdy did in fact intend or expect injury. They simply attempted to prove their case by introducing circumstantial evidence

which they hoped would convince the court that it was impossible to believe otherwise.

The trial court found Dr. McCall-Perez's testimony to be more credible than that of Dr. McGrath. (Transcript of Court's Decision pp. 4-5) (App. 56-62). The trial court found that Purdy had not in fact intended or expected to injure the Lerback boys at the time he sexually molested them. (Findings of Fact No. 9 & 10) (App. 69-70.) The trial court concluded that since there was no intention or expectation of injury, the exclusion on which American Family relied did not apply. (Conclusion of Law No. 3) (App. 70-71). Therefore, the trial court entered a judgment ordering American Family to defend and indemnify Purdy in the principal action. (App. 63-65.)

C. APPEAL TO THE SUPREME COURT OF SOUTH DAKOTA

American Family appealed the declaratory judgment to the Supreme Court of South Dakota. American Family alleged

the trial court had erred in denying its two motions for summary judgment. American Family urged the Supreme Court of South Dakota to adopt the holdings of other jurisdictions which held that the perpetrator's intent to injure or expectation of injury may be inferred as a matter of law due to the very nature of the conduct involved (sexual molestation).[4]

Lerbacks cautioned the Supreme Court of South Dakota to reject American Family's entreaty. Lerbacks argued that the language of the intentional injury exclusion applied only when the insured expects or intends injury. Lerbacks directed the court's attention to the fact that the exclusion's language was drafted to focus attention on the insured's subjective intentions or expectations, not those of a reasonable prudent person.

Lerbacks argued that because the exclusionary clause required the court to

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[4]See cases listed in footnote 7.

focus attention on the insured's intentions or expectations, and because the evidence presented at the trial in the declaratory judgment action proved that Purdy did not intend or expect to injure Christian or Andrew Lerback, the exclusionary language did not apply in this case.

1. Legal inference ignores language of exclusion

Lerbacks argued that adoption of the rationale employed by the majority of other jurisdictions -- that an intent to injure or an expectation of injury could be inferred as a matter of law -- would violate the language of the insurance contract. The court's attention would no longer be focused on the insured's intentions or expectations; rather, the court's focus would simply be placed on determining what type of conduct was involved. Coverage would automatically be excluded for any injuries arising out of criminal sexual contact regardless of the insured's actual intent or expectation.

Since the insurance policy contained no specific exclusion for sexual molestation, Lerbacks argued that adoption of the rule of law urged by American Family illegally ignored the policy language. Rodriguez v. Williams, 729 P.2d 627, 630 (Wash. 1986).

2. Legal inference ignores individuality of the human mind

Lerbacks also urged the Supreme Court of South Dakota to reject American Family's proposition for the reason that it ignores the fact that each individual's mind operates differently. Some people suffer from mental aberrations that prevent them from thinking as reasonable prudent people. See, e.g., Gebhard, Gagman, Palmeroy, Christians, Sex Offenders (Harper & Row, 1965); Finkelhor, Child Sexual Abuse: New Theory and Research, (Free Press, 1984); Finkelhor, A Sourcebook on Child Sexual Abuse (Sage Publications, Inc., 1986).

In the case of pedophiles, this mental deficiency causes them to believe that they are engaged in a loving relationship with

their victims or that their victims are playmates. This twisted mental process prevents them from recognizing the inherent injury which their victims may suffer as a consequence of the sexual molestation.

Because of their impaired mental abilities, pedophiles do not intend to injure their victims; rather, they intend to bestow upon them love and affection. Because they believe they are bestowing love and affection upon their victims, they do not expect that their victims will be injured by their conduct.

The fact that mental deficiencies can affect human behavior has long been recognized by the law. Criminal defendants can be found not guilty by reason of insanity if, at the time of the alleged crime, they suffer from a mental disease or defect which renders them unable to appreciate the nature and quality or the wrongfulness of their acts. 18 U.S.C. §17.

Since the law recognizes that individuals may suffer from mental deficiencies

which may affect their ability to form intentions, Lerbacks argued that it would be improper to adopt a rule of law which removes the question of a person's intentions or expectations from the factual arena and transforms it into a legal conclusion. Lerbacks argued that by adopting such a rule of law, the Supreme Court of South Dakota would be ignoring the possibility that an individual might be suffering from a mental disease or defect which could prevent him from forming an intention or expectation that the victim of the sexual molestation would be injured.

Since the language of the exclusion would only apply if such an intention or expectation actually existed, and since a mentally impaired person may be unable to form the required intention or expectation, a rule of law which automatically inferred a malicious intention or expectation would extend application of the exclusion into factual circumstances where it would not otherwise apply.

3. Adoption of legal inference would ignore scientific evidence

Finally, Lerbacks argued that the adoption of the rule of law urged by American Family would ignore scientific evidence. There was scientific evidence presented at trial which proved that Purdy did not intend or expect to injure Christian and Andrew Lerback. Dr. McCall-Perez testified that in his opinion, Purdy did not intend or expect to injure the Lerback boys. (App. 9-11, 25-47.) American Family's expert, Dr. McGrath, testified that it was possible that Purdy did not intend or expect to injure the Lerback boys. (App. 52-55.) Thus, the testimony of American Family's own expert established that a rule of law which infers an intent to injure or an expectation of injury in every case of sexual molestation would be erroneous because some perpetrators do not intend or expect to injure their victims.

4. Adoption of legal inference would violate the Constitution of the United States

a. Due Process

In addition to opposing American Family's arguments, Lerbacks also informed the court that adoption of the rule of law urged by American Family would violate the Constitution of the United States. Lerbacks first raised these constitutional issues in Lerbacks' Brief of Appellees filed in the Supreme Court of South Dakota on August 2, 1991, at pp. 37-47. (App. 73-89.) These constitutional arguments were again discussed and an additional argument regarding constitutional violation was raised in Lerbacks' Petition for Rehearing dated April 10, 1992, at pp. 3-16. (App. 110-135).

The opinion of the Supreme Court of South Dakota did not acknowledge that any constitutional arguments had been presented. The Supreme Court of South Dakota's failure address the federal questions prompted Lerbacks to petition the

court for rehearing; however, a majority of the court did not request rehearing and an order denying the petition for rehearing was entered April 29, 1992. (App. 136-37.)

Lerbacks argued that inferring an intent to injure as a matter of law in cases involving sexual abuse deprived insureds of property without due process of law. See Brief of Appellees Lerback dated August 2, 1991 at pp. 37-45. (App. 73-89.)

i. Insureds hold a property interest in insurance coverage

First, Lerbacks established that insureds have a property interest in insurance coverage and proceeds. Bishop v. Wood, 426 U.S. 341, 344, n.6 (1976); Board of Regents v. Roth, 408 U.S. 564 (1972); Gray Panthers v. Schweiker, 652 F.2d 146, 148 n. 2 (D.C. Cir. 1981); Fayle v. Stapley, 607 F.2d 858, 861 (9th Cir. 1979); Carlson v. Hudson, 277 N.W.2d 715, 719 (S.D. 1979) (a contractual provision can give rise to a claim of entitlement which may not be deprived without due process).

ii. Legal inference creates irrebuttable presumption

Next, Lerbacks demonstrated that adoption of a rule of law which infers an intent to injure or an expectation of injury in every case of sexual molestation creates an irrebuttable presumption. State Farm Fire & Casualty Company v. Abraio, 874 F.2d 619, 623 (9th Cir. 1989) (the presumption of intent to harm is irrebuttable); State Farm Fire & Casualty Company v. Smith, 907 F.2d 900, 903 (9th Cir. 1990) (intent to harm may be inferred from sexual contact with a minor as a matter of law, irrespective of the intent of the insured).

The determination of the insured's intent is transformed from a question of fact to a question of law. Factual evidence tending to prove the insured's intent to injure, or lack thereof, becomes irrelevant because the law establishes the insured's intent to injure. The legal inference is irrebuttable.

iii. The irrebuttable presumption is not necessarily nor universally true

Lerbacks demonstrated that the irrebuttable presumption of an intent to injure or expectation of injury was not necessarily or universally true. Both psychological experts testified that some perpetrators of sexual molestation do not intend or expect to injure their victims. (App. 22-55.)

iv. The irrebuttable presumption unconstitutionally deprives citizens of property without due process of law

Lerbacks demonstrated how irrebuttable presumptions which are not necessarily or universally true violate the Constitution of the United States. Vlandis v. Kline, 412 U.S. 441 (1973); Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974); Stanley v. Illinois, 405 U.S. 645 (1972). These cases establish that irrebuttable presumptions violate the due process clauses of the Constitution because they

deprive persons of their property interests without providing them a fair opportunity to rebut the presumption.

Irrebuttable presumptions have long been disfavored under the due process clauses of the fifth and fourteenth amendments to the United States Constitution. Cleveland Board of Education v. LaFleur, 414 U.S. at 644.

v. Reasonable alternative means exist to determine intention or expectation

Irrebuttable presumptions which are not necessarily or universally true in fact are especially disfavored when reasonable alternative means exist for making the crucial determination. LaFleur, 414 U.S. at 644-45; Vlandis, 412 U.S. at 452. In sexual molestation cases, reasonable alternative means exists for making the determination of whether insureds intend or expect to injure their victims. That alternative is the precise declaratory judgment procedure which American Family elected to employ in this case.

A trial court is fully capable of hearing the evidence on both sides of the issue and rendering a decision whether an insured intended or expected to injure his victims. An irrebuttable presumption that all perpetrators of sexual molestation intend or expect to injure their victims is not warranted because reasonable alternative means exist for making that determination.

The adoption of a rule of law which infers as a matter of law that every perpetrator of sexual molestation intends or expects to injure his victims creates an irrebuttable presumption. The irrebuttable presumption is not necessarily or universally true. Reasonable alternative means exist for determining whether an insured intends or expects to injure.

Lerbacks provided the Supreme Court of South Dakota with authority from the Supreme Court of the United States holding that irrebuttable presumptions which are not necessarily or universally true violate

the due process clauses of the fifth and fourteenth amendments to the Constitution of the United States. Nevertheless, the Supreme Court of South Dakota reversed the trial court and established a rule of law which infers an intent to injure or an expectation of injury in every case of criminal sexual contact. Purdy, 483 N.W. 2d at 201.

b. Equal Protection

Lerbacks cautioned the court that adoption of a legal inference that all perpetrators of criminal sexual contact intend or expect to injure their victims would deny equal protection of the laws in violation of the fourteenth amendment to the Constitution of the United States. This argument was first raised in Lerbacks' Appellees' Brief at p. 45 (App. 88-89), and was more fully developed in Lerbacks' Petition for Rehearing dated April 10, 1992, at pp. 8-10 (App. 120-24.)

i. Perpetrators of non-sexual criminal contact are afforded an opportunity to demonstrate the absence of intent to injure or expectation of injury

Lerbacks directed the Supreme Court of South Dakota's attention to the fact that in other cases involving criminal contact, the question of whether an insured intended or expected to injure the victim was a question of fact which precluded the award of summary judgment. See, e.g., Allstate Ins. Co. v. Steinemer, 723 F.2d 873 (11th Cir. 1984). See also, Annotation, Construction and Application of Provision of Liability Insurance Policy Expressly Excluding Injuries Intended or Expected by Insured, 31 A.L.R.4th 957 (1984).

Shortly before oral argument of this matter before the Supreme Court of South Dakota, that court rendered its decision in the case of Tri-State Insurance Company of Minnesota v. Bollinger, 476 N.W.2d 697 (S.D. 1991). The Bollinger case involved a fist fight between two men which resulted

in one man falling and breaking his ankle. The homeowner's insurance carrier for the perpetrator of the criminal contact denied coverage for the injury on the basis of the intentional injury exclusion contained in the homeowner's insurance policy.

The homeowner's policy involved in the Bollinger case excluded coverage for injury which was expected or intended by the insured. Id. at 699. The Supreme Court of South Dakota held that summary judgment would be improper because the exclusion would apply only if the injury (as opposed to the act) was intended or expected by the insured. Id. at 701. Since a genuine dispute existed regarding the insured's intentions or expectations, the Supreme Court of South Dakota ruled that summary judgment would be improper. Id. at 700-01.

ii. The legal inference applies a different legal standard which denies equal protection of the laws

Lerbacks argued that the Bollinger opinion recognized that just because a person's conduct might outwardly indicate an intent to injure or an expectation that injury could result as a consequence of the insured's act, it was possible that no such intention or expectation existed under the particular circumstances of each case. See also, Purdy, 483 N.W.2d at 200 ("Generally, the matter of coverage should be determined on a case by case basis as a question of fact after a consideration of all competent evidence by the fact finder."). That same rule of law should apply whether the criminal contact involved is one of aggressive physical assault and battery or one involving the fondling of a child's genitals without the use of force.

iii. No rational basis exists for distinguishing between criminal sexual contact and other forms of criminal contact

To apply a different standard simply because of the sexual nature of the assault denies equal protection of the law by

drawing a distinction without a difference. In either case -- criminal assault and battery or criminal sexual contact -- the person committing the crime could possibly be operating under circumstances where no intention or expectation of injury exists. In either case, the insured's intentions or expectations are questions of fact and should be decided on a case-by-case basis, not by summary judgment.

In Purdy, the Supreme Court of South Dakota distinguished Bollinger on the basis that it involved a spur-of-the-moment physical encounter between two men; whereas, Purdy involved repeated instances of sexual molestation occurring over several years. Purdy, 483 N.W.2d at 200. The South Dakota Supreme Court did not, however, discuss why that distinction transformed the question of fact -- Purdy's intentions or expectations -- into an issue which could be decided as a matter of law.

The Purdy decision of the Supreme Court of South Dakota, a branch of state

government, denies equal protection of the law. It establishes a specific class of individuals -- insureds who commit criminal sexual contact. It then deprives that class of a fundamental right -- its property interest in insurance coverage. There is no rational basis for discriminating against this class because the same mental deficiencies which may affect the abilities of other insureds to form intentions or expectations may also affect members of the class. The class is over-inclusive because it includes members who do not intend or expect to injure others.

The policy language was drafted so that coverage was excluded only if the insured intended or expected injury. The Purdy decision denies equal protection of the laws to those who sexually molest children because it deprives them of the opportunity to preserve their property interest in insurance coverage by demonstrating that they did not intend or

expect to injure their victims -- an opportunity which is afforded to all other insureds.

Equal protection of the laws demands that insurance companies provide coverage to criminal sexual abusers unless the insurance companies can prove that the insured intended or expected the victim to be injured. That same legal protection provided to other insured persons must be equally provided to those who commit criminal sexual contact.

c. Impairment of obligations of contract

In their Petition for Rehearing, Lerbacks informed the court that its holding in the Purdy opinion unconstitutionally impaired the obligations of contract. Petition For Rehearing, pp. 11-16 (App. 125-35.) The Constitution of the United States prohibits the establishment of any law which impairs the obligations of contract. U.S. Const. Art. I, § 10, cl. 1.

i. The Supreme Court of South Dakota is a state actor

Lerbacks stated that the Supreme Court of South Dakota, as a branch of state government is, therefore, a state actor for constitutional purposes. It established a law by its Purdy decision which impaired the obligations of the insurance contract between Purdy and American Family.

ii. The Purdy decision impairs the obligations of the insurance contract

The policy which was drafted by American Family excludes coverage for injuries which were intended or expected by the insured. The opinion of the South Dakota Supreme Court effectively expanded that language so that it applied not only under circumstances where the insured intended or expected injury, but also in any case involving criminal sexual contact, whether or not the insured intended or expected injury.

The Purdy opinion impairs the obligations of contract by eliminating insurance

coverage to insured perpetrators of criminal sexual contact who do not intend or expect to injure their victims. But for the Supreme Court of South Dakota's decision which established the rule of law which infers an intent to injure or an expectation of injury as a matter of law, those insureds would have been entitled to insurance coverage. The contractual obligations owed by insurance companies to those insureds are impaired to the insureds' detriment.

The Supreme Court of South Dakota denied Lerbacks' Petition for Rehearing without addressing this federal question.

ARGUMENTS SUPPORTING ISSUANCE OF A WRIT OF CERTIORARI

I. A State Court has Decided a Federal Question in a Way that Conflicts with Applicable Decisions of the Supreme Court of the United States

A. The Supreme Court of South Dakota established a rule of law which created an irrebuttable presumption that is not necessarily or universally true, and which serves to deprive insureds of insurance coverage without due process of law

1. Purdy established an irrebuttable presumption which is not necessarily or universally true

The Supreme Court of South Dakota's Purdy decision established a rule of law which creates an irrebuttable presumption that all perpetrators of criminal sexual contact intend to injure their victims, or expect that their victims will be injured. Purdy, 483 N.W. 2d at 201. Psychological evidence presented to the trial court by both parties -- including testimony by American Family's own psychological expert -- established that this irrebuttable presumption is not necessarily or universally true. (App. 25-55.)

2. The irrebuttable presumption deprives the insured of property without due process of law

The effect of the irrebuttable presumption is to deprive insureds who sexually molest children of insurance coverage without providing them an opportunity to prove that they did not intend or expect to injure their victims.

3. Purdy conflicts with applicable decisions of the Supreme Court of the United States

Because the rule of law established in the Purdy opinion as well as other jurisdictions throughout the United States[5] creates an irrebuttable presumption which is not necessarily or universally true, and which deprives insureds of their property interest in insurance coverage, and because reasonable alternative means exist for determining whether insureds intend or expect injury, the Purdy decision unconstitutionally deprives insureds who commit criminal sexual contact of their property without due process of law.

The Supreme Court of the United States has consistently held that under certain circumstances, irrebuttable presumptions violate the constitution of the United States. When an irrebuttable presumption is not necessarily or universally true, where reasonable alternative means exist

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[5] See cases listed in footnote 7.

for determining the presumed fact, and where application of the irrebuttable presumption results in the deprivation of a constitutionally guaranteed right, the irrebuttable presumption violates the federal constitution by depriving citizens of their constitutionally guaranteed interests without due process of law. Vlandis v. Kline, 412 U.S. 441 (1973); Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974); Stanley v. Illinois, 405 U.S. 645 (1972).

a. Purdy establishes an irrebuttable presumption

The Purdy opinion establishes an irrebuttable presumption. The South Dakota Supreme Court held that in all criminal sexual contact cases, it will be inferred as a matter of law that harm was expected or intended. Purdy, 483 N.W.2d at 201. Such an inference is irrebuttable. State Farm Fire & Casualty Co. v. Abraio, 874 F.2d at 623 (the presumption of intent to harm is irrebuttable).

b. The irrebuttable presumption operates to deprive property

The irrebuttable presumption operates to deprive insureds who engage in criminal sexual contact of their property interest in insurance coverage without due process of law. Insureds possess a constitutionally protected property interest in insurance coverage. Bishop v. Wood, 426 U.S. 341, 344, n.6 (1976); Board of Regents v. Roth, 408 U.S. 564 (1972); Gray Panthers v. Schweiker, 625 F.2d 146, 148, n.2 (D.C. Cir. 1981); Fayle v. Stapley, 607 F.2d 858, 861 (9th Cir. 1979); Carlson v. Hudson, 277 N.W.2d 715, 718 (S.D. 1979)

c. No pre-deprivation procedural protection is provided

The Purdy decision operates to automatically exclude insurance coverage in every case involving criminal sexual contact where the insurance policy contains an intentional injury exclusion. Insureds are not given a fair opportunity to

preserve their property interests in insurance coverage because any evidence that they did not intend or expect to harm the victims is rendered irrelevant by virtue of the Purdy rule of law. State Farm Fire & Casualty Co. v. Smith, 907 F.2d 900, 903 (9th Cir. 1990) (intent to harm may be inferred from sexual contact with a minor as a matter of law, irrespective of the actual subjective intent of the insured).

d. Reasonable alternative means exist for determining insureds' intentions or expectations

Reasonable alternative means exist for determining whether insureds intend or expect to injure their victims. Insurance companies can adequately protect their interests by initiating declaratory judgment actions to resolve that factual issue. The declaratory judgment procedure is not unduly burdensome and is essential to protect insureds' property rights from deprivation based upon exclusions which may

not apply under the specific facts and circumstances of each case.

The Supreme Court of South Dakota's Purdy decision established an irrebuttable presumption; the irrebuttable presumption operates to deprive insureds of property interests -- their interests in insurance coverage; the irrebuttable presumption is not necessarily or universally true in fact; and, reasonable alternative means exist for determining whether insureds intend or expect to injure their victims of criminal sexual contact

Decisions by the Supreme Court of the United States have established beyond dispute that this combination of factors requires abolishment of the rule of law which creates the irrebuttable presumption because the presumption violates the Constitution of the United States. Vlandis v. Kline, 412 U.S. 441 (1973); Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974); Stanley v. Illinois, 405 U.S. 645 (1972).

B. Review is necessary to resolve the conflict between Purdy and decisions of the Supreme Court of the United States

The Supreme Court of South Dakota's Purdy decision, as well as decisions of jurisdictions throughout the United States on this very same issue,[6] conflicts with the aforementioned decisions of the Supreme Court of the United States. Because Purdy and numerous other judicial decisions contradict the law established by the Supreme Court of the United States, this petition for writ of certiorari presents an important federal question which cries out for resolution by the Supreme Court of the United States. Therefore, petitioner respectfully requests this court to issue a writ of certiorari to the Supreme Court of South Dakota so that the constitutional error being committed by many jurisdictions throughout the United States may be corrected.

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[6] See cases cited at footnote 7.

II. A State Court of Last Resort has Decided an Important Question of Federal Law which has not been, but Should be, Settled by the Supreme Court of the United States

A. The Purdy opinion denies equal protection of the law to perpetrators of criminal sexual contact by depriving them of insurance coverage without providing the same procedural safeguards afforded to perpetrators of other forms of criminal contact

This case presents an important federal question which should be decided by the United States Supreme Court because if the Purdy decision violates the Constitution of the United States, so do the opinions of state and federal courts rendered in similar cases in no less than twenty-five jurisdictions throughout the United States. Constitutional error being committed on such a grand scale mandates review by the Supreme Court of the United States.

1. This issue has been decided by a large number of jurisdictions

The very same issue presented in the Purdy case -- whether a claim for damages arising out of criminal sexual abuse is

excluded from homeowner's insurance coverage by the terms of an intentional injury exclusion -- has been presented to numerous state and federal courts.[7]

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[7]State Farm Fire & Cas. Co. v. Smith, 907 F.2d 900 (9th Cir. 1990); Foremost Ins. Co. v. Weetman, 726 F. Supp. 618 (W.D. Pa. 1989); Allstate Ins. Co. v. Thomas, 684 F. Supp. 1056 (W.D. Okla. 1988); Allstate Ins. Co. v. Roelfs, 698 F. Supp. 815 (D. Alaska 1987); Allstate Ins. Co. v. Foster, 693 F. Supp. 886 (D. Nev. 1988); Allstate Ins. Co. v. Jack S., 709 F. Supp. 963 (D. Nev. 1989); CNA Ins. Co. v. McGinnis, 282 Ark. 90, 666 S.W.2d 689 (1984); Twin City Fire Ins. Co. v. Doe, 163 Ariz. 388, 788 P.2d 121 (App. 1989); J.C. Penney Cas. Ins. Co. v. M.K., 52 Cal.3d 1009, 278 Cal. Rptr. 64, 804 P.2d 689 (1991); Allstate Ins. Co. v. Troelstrup, 789 P.2d 415 (Colo. 1990); Landis v. Allstate Ins. Co., 546 So. 2d 1051 (Fla. 1989); Allstate Ins. Co. v. Jarvis, 195 Ga. App. 335, 393 S.E.2d 489 (1990); Roe v. State Farm Fire & Cas. Co., 188 Ga. App. 368, 373 S.E.2d 23 (1988); Scudder v. Hanover Ins. Co., 201 Ill. App. 3d 921, 147 Ill. Dec. 386, 559 N.E.2d 559 (1990); Altena v. United Fire & Cas. Co., 422 N.W.2d 485 (Iowa 1988); Perreault v. Maine Bonding & Cas. Co., 568 A.2d 1100 (Me. 1990); Harpy v. Nationwide Mutual Fire Ins., 76 Md. App. 474, 545 A.2d 718 (1988); Worcester Ins. v. Fells Acres Day School, 408 Mass. 393, 558 N.E.2d 958 (1990); State Mut. Ins. Co. v. Russell, 185 Mich. App. 521, 462 N.W.2d 785 (1990); Auto-Owners Ins. Co. v. Gardipey, 173 Mich. App. 711, 434 N.W.2d 220 (1988); Linebaugh v. Berdish, 144 Mich. App. 750, 376 N.W.2d 400 (1985); Estate of Lehmann by Lehmann v. Metzger, 355 N.W.2d 425 (Minn. 1984);

2. The majority infer an intent or expectation as a matter of law

The majority of these jurisdictions have held that an insured's intent to injure or expectation of injury can be

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State Farm Fire & Cas. Co. v. Williams, 355 N.W.2d 421 (Minn. 1984); Horace Mann Ins. Co. v. Ind. Sch. Dist.No. 656, 355 N.W.2d 413 (Minn. 1984); Fireman's Fund Ins. Co. v. Hill, 314 N.W.2d 834 (Minn. 1982); Illinois Farmers Ins. Co. v. Judith G., 379 N.W.2d 638 (Minn. App. 1986); Mutual Service Cas. Ins. Co. v. Puhl, 354 N.W.2d 900 (Minn. App. 1984); New Hampshire Ins. Group v. Strecker, 244 Mont. 478, 798 P.2d 130 (Mont. 1990); State Farm Fire & Cas. v. van Gorder, 235 Neb. 355, 455 N.W.2d 543 (1990); Vermont Mut. Ins. Co. v. Malcolm, 128 N.H. 521, 517 A.2d 800 (1986); Atlantic Employers Ins. Co. v. Tots & Toddlers, 239 N.J. Super. 276, 571 A.2d 300 (1990), cert. denied, 122 N.J. 147, 584 A.2d 218 (1990); Western Nat. Assur. Co. v. Hecker, 43 Wash. App. 816, 719 P.2d 954 (1986); Rodriguez by Brennan v. Williams, 42 Wash. App. 633, 713 P.2d 135 (1986); Horace Mann Ins. Co. v. Leeber, 180 W. Va. 375, 376 S.E.2d 581 (1988); N.N. v. Moraine Mut. Ins. Co., 153 Wis. 2d 84, 450 N.W.2d 445 (1990); K.A.G. by Carson v. Stanford, 148 Wis.2d 158, 434 N.W.2d 790 (App. 1988); State Farm Fire & Casualty Co. v. Estate of Jenner, 856 F.2d 1359 (9th Cir. 1988), superseded, 874 F.2d 604 (9th Cir. 1989); State Auto Mutual Ins. Co. v. McIntyre, 652 F.Supp. 1177, 1195 (N.D. Alabama 1987); MacKinnon v. Hanover Insurance Company, 471 A.2d 1166 (N.H. 1984).

inferred as a matter of law when the insured sexually molests a child. Because this inference is a matter of law, factual evidence to the contrary is rendered irrelevant and inadmissable. Rodriguez by Brennan v. Williams, 42 Wash. App. 633, 713 P.2d 135 (1986).

More importantly, however, the rule of law established in these opinions destroys any possibility of insurance coverage provided by policies which include intentional injury exclusions.

3. The legal inference denies equal protection of law

Those jurisdictions which infer an intent to injure as a matter of law deny equal protection of the laws to insureds who commit criminal sexual contact. Individuals who commit other forms of criminal contact are given a fair hearing on the issue of their intentions or expectations.

This general rule was recognized by the Supreme Court of South Dakota's Purdy decision:

> "The circumstances under which the act in question was done usually serve to manifest to a greater degree the intent of the actor and may overcome his declaration as to his intention, but he has the right to testify to his intention and to have the circumstances surrounding the act considered in connection with his testimony."

Purdy, 483 N.W.2d at 200, quoting Shook v. Tinny, 122 Ill. App. 3d 741, 78 Ill. Dec. 58, 62, 461 N.E.2d 642 (1984) (emphasis added).

4. No rational basis exists for a distinction based on the type of crime

There is no rational basis for denying the same legal protection to those insureds who commit criminal sexual contact as is afforded to those who commit other forms of criminal contact. In either case, the insureds' intentions or expectations are questions of fact because the issue involves state of mind. "Actions involving

state of mind, which include cases involving intent, are not usually suited for summary disposition." Ahl v. Arnio, 388 N.W.2d 532, 534 (SD 1986). Since no two human minds operate identically, what one individual may intend or expect does not automatically and necessarily mean every individual has the same intentions or expectations under the same circumstances.

Since no rational basis exists for discriminating against those who commit criminal sexual contact, courts throughout the United States who infer an intent to injure or an expectation of injury as a matter of law in cases of criminal sexual contact deny equal protection of the laws in violation of the fourteenth amendment to the Constitution of the United States. Because the denial of equal protection is occurring on such a massive scale, this issue raises an important question of federal law which has not been, but should be, settled by the Supreme Court of the United States.

B. The Purdy decision established a rule of law which impairs the obligations of contract in violation of the Constitution of the United States

The obligations of a contract are impaired by a law which renders them invalid, or releases or extinguishes them. Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934). The obligation of contract is the law which binds the parties to perform their agreement. Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 197 (1819).

An important question of federal law which is raised by this petition is whether a judicial decision by a state's highest court establishes "law" as that term is used in the Constitution of the United States, article I, section 10, clause 1. If so, and if the judicial opinion by a state's highest court has the effect of impairing obligations of contracts, then the judicial opinion violates the United States Constitution just as surely as if the state's legislature had passed a law having

the same impairing effect upon the obligations of contracts.

1. An insurance agreement is a contract

It is beyond dispute that the insurance agreement between American Family and Purdy was a contract. The insurance policy established the terms under which American Family, in exchange for the payment of premiums, would defend and indemnify Purdy if others incurred bodily injury as a result of an occurrence.

The policy also contained a list of exclusions. The exclusions defined types of claims which would not obligate American Family to defend or indemnify Purdy. One such exclusion in the policy relieved American Family of any obligation to defend or indemnify Purdy against claims arising under circumstances where Purdy intended or expected to injure another person.

A trial on the issue of whether Purdy intended or expected to injure the Lerback boys resulted in a finding that Purdy had

not intended or expected to injure the children. (App. 69-70.) Thus, because the exclusion did not apply, the court ordered American Family to defend Purdy in the underlying principal action and to indemnify him for the amount of any judgment rendered against him in that action. (App. 64-65.)

On appeal, the Supreme Court of South Dakota stated that the trial court judge had correctly applied South Dakota law in denying American Family's motions for summary judgment. Purdy, 483 N.W.2d at 201. Under the law of South Dakota, as it existed at the time the question was before the trial court, whenever questions of fact existed, summary judgment was inappropriate. Id.

2. The Purdy decision established new law

However, in its Purdy decision, the Supreme Court of South Dakota carved a new exception into South Dakota law. The Purdy decision established a new law which infers

an intent to injure or an expectation of injury in every case involving criminal sexual contact. Id.

The Supreme Court of South Dakota then applied this newly created law and reversed the trial court's denial of summary judgment ordering the trial court to enter judgment in favor of American Family. Id. Because Purdy's intent to injure was established as a matter of law, the trial court was directed to enter judgment in favor of American Family based on the policy's intentional injury exclusion.

3. Purdy impaired the obligations of the insurance contract

The judicially-created law contained in the Purdy opinion impaired the insurance contract between Purdy and American Family. At the time the Purdys' homeowner's policy agreement was formed, and continuing throughout the years the sexual molestation was occurring, to the date of the Supreme Court of South Dakota's Purdy decision, the law of South Dakota held it to be a ques-

tion of fact whether an insured intended or expected injury. Bollinger, 476 N.W.2d 697 (SD 1991). If the insured did not intend or expect injury, the intentional injury exclusion contained in insurance policies would not apply. Id.

Following the issuance of the Purdy opinion, however, the law of South Dakota changed. No longer was the question of the insured's intentions or expectations a question of fact in cases involving criminal sexual contact. The issue was suddenly transformed into a matter of law which effectively excluded insurance coverage in every case of criminal sexual contact.

Prior to the issuance of the Purdy opinion, American Family was obligated to defend and indemnify Purdy in the underlying principal action because the trial court found that Purdy had not intended or expected to injure the Lerback boys. Thus, American Family was obligated to defend Purdy and indemnify him for any

judgment which the Lerbacks obtained against him.

The obligation which American Family owed to Purdy, and ultimately to the Lerbacks as judgment creditors of Purdy, was impaired when the Purdy decision was rendered. At that time, American Family was no longer obligated to defend or indemnify Purdy even though Purdy did not in fact intend or expect to injure the Lerback boys.

This change in American Family's contractual obligation to Purdy came about solely as a result of the Supreme Court of South Dakota's establishment of the rule of law set forth in the Purdy opinion. The Purdy opinion had the effect of retroactively changing the law which was in existence at the time the insurance agreement was formed and which was an implied term in the insurance agreement. Hipp v. Prudential Casualty and Surety Co., 60 S.D. 300, 244 N.W. 346, 348 (1946)(the law which exists at the time a contract is

formed becomes an implied term in the contract).

The Supreme Court of South Dakota, with the stroke of a pen in the Purdy decision, changed the law which had been an implied term in the insurance contract. The legal change in the contractual obligation was brought about by South Dakota's highest court just as surely as if the South Dakota legislature had done so. That change in the law had the effect of depriving Purdy, and ultimately the Lerbacks as Purdy's judgment creditors, of coverage which otherwise would have been available to satisfy the judgment.

The Constitution of the United States forbids any state from passing any law which impairs the obligations of contract. U.S. Const. art. I, § 10, cl. 1. The Supreme Court of South Dakota, as a branch of state government, is a state actor for constitutional analysis purposes. Its pronouncements in the form of judicial decisions have the force and effect of law.

Not only the parties to this action, but all other South Dakota citizens are bound by its decisions just as they would be by a legislative enactment.

The Purdy opinion impairs the obligations of the insurance contract in violation of the Constitution of the United States.

4. Whether a decision of a state court of last resort makes law subject to the Contracts Clause is an important federal question

The issue of whether a state's highest judicial authority violates the Constitution of the United States when it issues a judicial decision which has the effect of impairing obligations of contract is an important federal question which has not been, but should be, decided by the Supreme Court of the United States. Therefore, petitioners, respectfully request the court to issue a writ of certiorari to the Supreme Court of South Dakota so that this issue may be decided.

Conclusion

A substantial number of jurisdictions have issued decisions which violate constitutional principles. Some attempt to justify their judgments on the public policy which believes sexual molesters will be deterred from such conduct if they are forced to pay damages from their own funds. This line of reasoning believes perpetrators will be unjustly rewarded for their criminal conduct if insurance proceeds are available to compensate the victims of their misdeeds. See, e.g., Whitt v. Deleu, 707 F. Supp. 1011 (W.D. Wis. 1989).

There is, however, a great public interest in protecting the interests of the injured party. St. Paul Fire & Marine Ins. Co. v. Asbury, 720 P.2d 540 (Ariz. Ct. App. 1986); Vigilant Ins. Co. v. Kambly, 319 N.W.2d 382, 385 (Mich. Ct. App. 1982).

Analysis of the argument that forcing a perpetrator to pay for damage he causes will somehow deter sexual molesters compels

the conclusion that any such deterrent effect is illusory:

> Initially, it is unlikely that the insured was induced to engage in the unlawful conduct by reliance upon the insurability of any claims arising therefrom or that allowing insurance coverage here would induce future similar unlawful conduct by practitioners. Nor does it appear that the policy was obtained in contemplation of a violation of the law . . . Furthermore, coverage does not allow the wrongdoer unjustly to benefit from his wrong. It is not the insured who will benefit, but the innocent victim who will be provided compensation for her injuries . . . In this instance, there is great public interest in protecting the interests of the injured party.

Asbury, 720 P.2d at 542; see also, Kambly, 319 N.W.2d at 385.

When the remote possibility that sexual molesters will be deterred by the denial of insurance coverage is weighed against the virtual certainty that without coverage, many innocent victims of sexual abuse will be denied any hope of compensation for their injuries, the policy bases supporting a presumption of a malicious intent or expectation are

severely eroded. This deprivation of compensation to victims becomes even more tragic when the lack of funds results in the victim being unable to seek counseling, and ultimately going on to sexually molest other children.

The presumption of an intent to injure or an expectation of injury is without logical support; it violates constitutional principles; and it contravenes public policy. This petition raises important federal questions which require resolution by the Supreme Court of the United States.

For all of the reasons set forth above, Lerbacks respectfully petition this court to issue a Writ of Certiorari to the Supreme Court of South Dakota to review the Purdy decision.

Respectfully Submitted,

Donald P. Knudsen
Gunderson, Palmer, Goodsell
& Nelson
P.O. Box 8045
Rapid City, SD 57709-8045
(605) 342-1078

92-206

NO. 92-206

Supreme Court, U.S.
FILED
JUL 28 1992
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES
OF AMERICA

OCTOBER TERM, 1991

AMERICAN FAMILY MUTUAL
INSURANCE COMPANY,

Respondent.

v.

BRADLEY ALAN PURDY, D.L. and J.L.,
and D.L. as Guardian ad Litem
of C.L. and A.L., Minors,

Petitioners.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH DAKOTA

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Donald P. Knudsen
Counsel of Record for
Petitioners D.L., J.L.
and D.L. as Guardian ad
Litem of C.L. & A.L.,
Minors
GUNDERSON, PALMER,
GOODSELL, & NELSON
P.O. Box 8045
Rapid City, SD 57709
(605) 342-1078

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STATE OF SOUTH DAKOTA
COUNTY OF PENNINGTON

IN CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT

File No. 88-1209

DEPOSITION OF BRADLEY PURDY

****

AMERICAN FAMILY MUTUAL
INSURANCE COMPANY,

Plaintiff,

vs.

BRADLEY ALAN PURDY; DAVID
LERBACK and JANI LERBACK,
and DAVID LERBACK as Guardian
ad Litem of CHRISTIAN LERBACK
and ANDREW LERBACK, Minors,

Defendants.

****

Page 58:3-4

Q You didn't intend to cause them any harm?

A No.

Page 61:18-62:5

Q You certainly didn't intend to harm them, did you?

A No, sir.

Q But thinking about it, being honest about it, you had to have in your mind an expectation that they would suffer

some degree of emotional distress, didn't you?

A While I was molesting?

Q During that time frame?

A No.

Q You had no thoughts one way or the other?

A No.

Q And you had no thoughts that they could expect to have some adverse consequences?

A No.

Page 63:2-9

Q During the time you were having sexual contact with the boys, you were still experiencing a good deal of that pain, weren't you?

A Yes. If I can interject something real quick. At that time, it was something to me that was more of a compulsion, I wanted to know why this had happened to me, what had happened, and I did not consider anything else of the consequences.

Pages 73:11-75:23

Q Brad, Mr. Deibert asked you questions regarding your victimization of sexual contact; you recall those questions?

A Yes.

Q And I understand and appreciate the fact that that's not a very happy period of your life, and that you've had to deal with the results of that experience for quite some time, have you not?

A Yes.

Q And I think it's probably a fair statement that that caused you quite a lot of emotional trauma; is that correct?

A I suppose so, yeah. I don't know exactly what you mean by quite a lot or anything like that. I was obviously traumatic for me, yes.

Q And you've had to deal with that for a number of years and you had to deal with it a number of year prior to the

contact you had with the Lerback children; is that correct?

A Yes.

Q And you were obviously fully aware of the trauma that you suffered at the time that you had the sexual contact with the Lerback children, were you not?

A I don't believe I was, no. I don't think I fully understood. I think that's what induced me to do what I did.

Q But you were fully aware of the trauma it had caused you, that being at the time, embarrassment, guilt?

A I was aware that I had those feelings from it, yes.

Q Were you aware that those feelings could also be imposed upon the Lerback children as a result of the same type of conduct to them?

Mr. Duffy: Object to the question and this line of questioning in that he's already answered a rather -- in a rather

sensitive area, he's already given full and complete answers to all these questions.

Mr. Barker: Subject to that objection, Brad.

A Can you repeat the question for me, please?

Mr. Knudsen: I'd join Mr. Duffy's objection.

Mr. Duffy: I'll object to the form in that it's unclear what you mean by those feelings.

Mr. Covey: I'll join in that objection.

Mr. Barker: Yeah, Kathy, would you read it back please?

(Requested question was read by the Court Reporter)

Mr. Barker: Go ahead if you can.

Mr. Duffy: Well, we're going to clear form objections up at the time of the deposition, so I still have the form objection to those feelings.

Q Brad, those feelings I was referring to in the question just prior to that,

those feelings that you testified to of guilt and remorsefulness and --

A Fear.

Q Fear.

A At the time I molested the children, no, I had no thought whatsoever that that could be imposed also on them.

Q That never entered your mind during the two-year period in which those incidents took place?

A No.

Pages 76:15-77:15

Q (By Mr. Knudsen) In response to a question by Mr. Deibert, and I believe it was an interjection you made and a pause after answering the question, you stated that you felt a compulsion to have this sexual contact with the children. Do you recall that testimony?

A Yes.

Q Could you define for me how you felt compelled to have this sexual contact?

A It's hard for me to try to explain what I was feeling at the time. It was an overriding need, if you will, for me to try to figure out what had happened to me. That was -- that was the only think that was on my mind at the time. I didn't think of anything else really.

Q My understanding of the word compulsion or compel, compulsion mainly, is that you aren't able to resist that impulse. Is that how you're using the term compulsion?

A Perhaps I chose the wrong word. It was more impulsive, more or less because it was never really planned out. I never went over actually thinking this is what I'm going to do. Certain things would trigger memories and things in my mind.

Q And then, the act would occur?

A Yes.

Page 81:1-18

Q Next, in response to Mr. Knudsen's first question here on redirect, you testified that when you first initiated the sexual contact with Christian and/or Andrew Lerback, you needed to try to figure out what had happened to you when you victimized, is that right?

A Yes.

Q In other words, was this somewhat of an experimental thing?

A I'm not certain exactly how I viewed it. I guess in retrospect, yes, it was somewhat of an experimental thing. I don't know.

Q You used the term impulsive or compulsive, is that right?

A I did, yes.

Q And each of these six or eight times it was compulsive or impulsive, is that right?

A It was impulsive, yes.

STATE OF SOUTH DAKOTA
COUNTY OF PENNINGTON

IN CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT

File No. 88-1209

AFFIDAVIT OF DR. FRED McCALL-PEREZ

****

AMERICAN FAMILY MUTUAL
INSURANCE COMPANY,

Plaintiff,

vs.

BRADLEY ALAN PURDY; DAVID
LERBACK and JANI LERBACK,
and DAVID LERBACK as Guardian
ad Litem of CHRISTIAN LERBACK
and ANDREW LERBACK, Minors,

Defendants.

****

State of Florida)
) ss.
County of Dade)

Fred McCall-Perez, Ph.D., being first duly sworn upon his oath, deposes and states:

1. I am a Certified Clinical Psychologist, with a Ph.D. in Learning Disabilities/Psychology from the University of Arizona, an M.A. in Development Psychology from Ohio State University, and a B.S. in Mental Retardation from the

University of Illinois. Presently, I am the General Manager of American Biodyne, Inc., Miami, Florida.

2. I have reviewed the Minnesota Multiphasic Personality Inventory ("MMPI") of Bradley Alan Purdy taken on August 11, 1989. Based upon my review of that information and based on other information available in the form of deposition testimony of Brad Purdy, statements given to the police by Brad Purdy and Christian Lerback, Intake Summary prepared by West River Mental Health Center, testimony of Brad Purdy and Richard Leir at the mitigation and sentencing hearing held August 5, 1986, it is my opinion that Brad Purdy suffers from impulse control problems. Mr. Purdy indicates that he is suffering from anxieties and fears, and when those anxieties and fears become intense, Mr. Purdy is likely to act out sexually.

3. It is my opinion that when acting out sexually, Mr. Purdy does not intend to

harm the victim of his acts; rather, I believe that Mr. Purdy's personality is of a type that would act out in this manner purely for his own sexual gratification and this type of person would convince himself or herself that the sexual contact was a form of love and friendship and was as pleasurable for the victim as for the perpetrator.

4. It is my opinion that Brad Purdy, at the time he sexually molested the Lerback children, did not intend any harm toward those children.

Dated this 2nd day of January, 1990.

Dr. Fred McCall-Perez

Subscribed and sworn to before me this ____ day of _____, 1989.

Notary Public

(SEAL)

My Commission Expires:

SEVENTH JUDICIAL CIRCUIT COURT
May 1, 1990
File No. 88-1209
MEMORANDUM DECISION
****
RE: American Family Mutual v. Purdy
****

Gentlemen:

This is a declaratory judgment action in which the Plaintiff, American Family Mutual seeks a determination as to coverage under a home owner's policy. Plaintiff claims that the acts of sexual contact committed by
Bradley Purdy are excluded from coverage based on the fact that harm to the boys was "Expected or intended". Brad Purdy has admitted to sexual contact with the Lerback children. Presently before the Court is Plaintiff's Motion for Summary Judgment.

The standards for Summary Judgment are clear in this state and will not be reiterated here. Summary Judgment would be appropriate in this case only if the Court could say, as a matter of law, that Bradley Purdy "Expected or intended" to cause harm

to the Lerback children. Brad Purdy testified that he did not intend harm on the children, and that his actions were motivated by selfishness with no consideration whatsoever as to the consequences his actions would have on the children. In further opposition to Plaintiff's Motion for Summary Judgment, Defendant's have presented the Affidavit of Dr. Fred McCall-Perez, a certified clinical psychologist. Dr. McCall-Perez opined that Brad Purdy "suffers from impulse control problems," and "does not intend to harm the victims of his acts." He further stated that someone with Mr. Purdy's personality acts out "purely for his own sexual gratification" and convinces himself that the "sexual contact was a form of love and friendship and was as pleasurable for the victim as for the perpetrator." The Plaintiff is asking the Court to essentially ignore this evidence and rule

as a matter of law that harm was expected or intended. This I cannot do.

The Court is well aware that a number of jurisdictions have ruled as a matter of law that in sexual contact cases, harm is intended or expected. In order for the exclusion to apply, a subjective finding that the insured "expected or intended" to cause harm by his actions must be made. The issue of a perpetrator's subjective intent, as in a criminal case, is a question of fact to be determined by the trier of fact. This Court thus relies on the minority view as expressed in J.C. Penney Casualty Ins. Co. v. M.K. 257 Cal. Rptr. 801 (Cal. App. 4 Dist. 1989) which found that "the matter of coverage should be determined on a case by case basis after a consideration of competent evidence, including psychiatric testimony," relevant to the insurer's subjective state of mind. Id. at 810. Because this Court refuses to

rule as a matter of law that Brad Purdy subjectively expected or intended to cause harm by his actions, the Plaintiff's Motion for Summary Judgment is denied.

Counsel for the Defendants may prepare an appropriate order for my signature. If anyone has any questions regarding this decision, please do not hesitate to contact me.

Sincerely,

JEFF W. DAVIS
Circuit Court Judge

STATE OF SOUTH DAKOTA
COUNTY OF PENNINGTON

IN CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT

File No. 88-1209

CONTINUED ORDER

****

AMERICAN FAMILY MUTUAL
INSURANCE COMPANY,

Plaintiff,

vs.

BRADLEY ALAN PURDY; DAVID
LERBACK and JANI LERBACK,
and DAVID LERBACK as Guardian
ad Litem of CHRISTIAN LERBACK
and ANDREW LERBACK, Minors,

Defendants.

****

Defendants, David Lerback, Jani Lerback and David Lerback as Guardian ad Litem of Christian Lerback and Andrew Lerback ("Lerbacks"), through Donald P. Knudsen of Gunderson, Palmer, Goodsell & Nelson, their attorneys, moved for a continuance of the trial tentatively scheduled in this action for December 18, 1990. Plaintiff, through Douglas Deibert,

of Cadwell, Sanford & Deibert, its attorneys, moved the Court to set aside its previous order denying plaintiff's Motion for Summary Judgment, or in the alternative, for summary judgment on the coverage issue. Plaintiff appeared through its attorney, Douglas Deibert, Lerbacks appeared through their attorney, Donald P. Knudsen, and defendant, Bradley Alan Purdy, appeared through his attorney, Patrick Duffy. The parties filed briefs and the Court heard oral argument. The Court granted Lerbacks' Motion for Continuance and denied plaintiff's Motion to Set Aside Previous Order Denying Motion for Summary Judgment, or in the Alternative, Motion for Summary Judgment.

IT IS ORDERED:

1. That Lerbacks' Motion for Continuance is granted. Trial of this matter shall be scheduled for January 25, 1990, commencing at 9:00 a.m.

2. That plaintiff's Motion to Set Aside Previous Order Denying Motion for Summary Judgment, or in the Alternative, Motion for Summary Judgment is denied.

Dated this 17th day of December, 1990.

BY THE COURT:

JEFF W. DAVIS
Circuit Court Judge

ATTEST:

Clerk of Courts, Ranae Truman

By_____
Deputy

(SEAL)

STATE OF SOUTH DAKOTA
COUNTY OF PENNINGTON

IN CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT

File No. 88-1209

JURY TRIAL

****

AMERICAN FAMILY MUTUAL
INSURANCE COMPANY,

Plaintiff,
vs.

BRADLEY ALAN PURDY; DAVID
LERBACK and JANI LERBACK,
and DAVID LERBACK as Guardian
ad Litem of CHRISTIAN LERBACK
and ANDREW LERBACK, Minors,

Defendants.

****

PROCEEDINGS: Held before the Honorable John K. Konenkamp, Circuit Judge at Rapid City, South Dakota on the 24th day of January, 1991.

****

MR. COVEY: At this time I would renew and I would ask the Court to reconsider its ruling as to Brad Purdy testifying with regard to the effects of his victimization himself in light of the testimony that has

already been received with respect to other victims and the effects upon them.

THE COURT: I am going to adhere to my ruling. I certainly have had a chance to think about that since the matter was first brought up, but in addition to what I have said earlier, to permit Mr. Purdy to testify that he was sexually abused himself and that now he's been able to work though that, in a sense makes him an expert witness on his own case. And unless you can establish that he's an expert witness in this area, he shouldn't be able, permitted to give an expert opinion, because what you are offering to do is suggest that the Lerback boys are not as damaged perhaps as they claim they are because Mr. Purdy, from his own experience, isn't as damaged, that damaged. That's purely an issue of expertise and you haven't offered me any indication that he

has some expertise in sexual abuse under 801 and 803.

MR. COVEY: As far as the word expert relating to experience, I think he may have the best experience, I think he may have the best experience for the area, however, I understand what the Court is saying with respect to the other qualifications.

THE COURT: If you analogize it to the cancer patient being an expert in their disease because they learn a lot about it experientially, but that doesn't necessarily make them an expert on the disease for the purposes of testifying in Court about someone else's damages. Any other motions from the defense?

STATE OF SOUTH DAKOTA
COUNTY OF PENNINGTON

IN CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT

File No. 88-1209

APPEAL TRANSCRIPT

****

AMERICAN FAMILY MUTUAL
INSURANCE COMPANY,

Plaintiff,
vs.

BRADLEY ALAN PURDY; DAVID
LERBACK and JANI LERBACK,
and DAVID LERBACK as Guardian
ad Litem of CHRISTIAN LERBACK
and ANDREW LERBACK, Minors,

Defendants.

****

DIRECT EXAMINATION OF DR. FRED McCALL-PEREZ
BY: MR. DONALD P. KNUDSEN:

Q Doctor, would you state your name and address for the record.

A Fred McCall-Perez, 1581 Brickel Avenue, Miami, Florida.

Q Can you tell us about your educational background.

A Yes. I am a clinical psychologist.

I have an undergraduate degree in mental retardation from the University of Illinois. Masters in developmental psychology from Ohio State University, a Ph.D. in learning disabilities, and clinical psychology from the University of Arizona.

Do you want my experience and background?

Q Yes, please.

A After graduating from the University of Arizona, I was teaching at the University of Arizona Medical School for 12 years, department of psychiatry and relevant to the case backgroundwise, I formed and was party to a sexual assault evaluation and research team, which began studies in the mid-1970's, formalized as an ongoing

unit in 1979, and, as part of that cooperation, we are doing ongoing research and work with victims, survivors of sexual assault, and I have been with other companies.

I have been with American Biodyne, which is a mental health care company in 13 states.

I am currently, most recently, as of this month, with a company called U.S. Behavior Health. This is based in San Francisco, and I run the southern operations, which includes mental health facilities for several states.

Q Doctor, I am going to show you what has been marked Defendant's Exhibit 2.

Could you describe that document for me?

A This is my resume' updated to about three months ago.

Q Can you tell us what you have done in the last three months that you would like to add to that resume'.

A Two things.

One under professional experience, my current job is behavior health, as I mentioned, and, secondly, under publications, I have a publication in December of 1990, in a magazine called Childwise, which deals with preschool children sexual assault and, in January of 1991, deals with sexual assault with school-age children.

PAGE 11:9-13:1

Q Doctor, you were retained to render an opinion as to whether

Bradley Purdy intended to harm Andrew and Christian Lerback or whether Bradley Purdy expected they'd be harmed as a result of his actions; is that correct.

A Yes.

PAGE 13:7-14:11

Q Doctor, based on the materials that you reviewed and the observations you have made, have you formed an opinion to reasonable psychological certainty regarding whether Brad Purdy intended to harm Andrew Lerback or Chris Lerback?

A Yes.

PAGE 15:24-16:4

Q Doctor, once again, with regard to the question of whether Bradley Purdy intended to harm

Christian or Andrew Lerback, what is your opinion on that?

A My opinion is that he did not intend to bring harm to Andrew or Christian Lerback.

Q On what do you base that opinion?

A On several things.

First of all, the MMPI, the interpretation, and the diagnostic impression really describes a personality type person, narcissistic, very self-centered personality type.

It significantly is not a personality type of somebody who would have the personality makeup or characteristics that would most probably assume an intention to harm.

Secondly, in reviewing all the materials, the depositions and the testimony, what I was looking

for was any indication of intent to harm.

I was unable to find any indication whatsoever of that intent.

Additionally, in the testimony offered yesterday by Brad Purdy himself, he described himself as somebody not intending to provide harm.

In addition to that, during the courtroom proceedings yesterday, not as part of the testimony, but as part of what was presented during the courtroom behavior, the attorneys and Brad, there was an expressed desire on the part of Brad Purdy to present himself and his history of his own abuse, and present himself as an example of how abuse had not really affected him in any adverse ways,

and he was expressing a desire to make the argument that therefore, he was a good example of how abuse would not necessarily be hurtful or harmful, and offering that as to why the kids were not in fact harmed.

All of those things, all the evidence I reviewed and the reports including the mental health report were considered in coming to that opinion.

PAGE 17:13-19:1

Q On the question of expectation of harm, Doctor, based upon the materials which you reviewed and the observations which you have made, have you formed an opinion to a reasonable psychological certainty regarding whether Bradley Purdy expected that harm would occur to Christian and

Andrew as a result of Mr. Purdy's sexual fondling?

A Yes, I have reached an opinion in that area.

Q What is your opinion?

A My opinion is that he did not expect any harm to come to the children.

That, quite to the contrary, that his own behavior is quite repetitive, unconscious and conscious, unconscious in terms of desire and motivation, with the actual -- I think he sees himself as someone who is not in any way trying to bring harm to the children whatsoever.

PAGE 19:6-22

Q You said your opinion was that he did not -- he did not impress you as being someone who expected harm to occur to the children.

What did you rely on in reaching that opinion?

A I was looking for evidence to the contrary.

In other words, I was looking for some evidence that his intent was to cause harm to the children in any way, so I relied primarily on the things that I mentioned earlier, particularly on the personality profile and his makeup of the tests administered in August of 1989, and his behavior in the courtroom yesterday, the lack of any of the other symptoms that would indicate any kind of harm or intent.

Q Or expectation?

A Expectation, right.

Q Doctor, is there literature available regarding an abuser's

knowledge, regarding the effect it has on the victim?

A Yes, there is. There is at least two types of literature.

There is literature that just describes psychological makeup and the psychodynamics of abusers.

There is also research that clearly indicates that abusers have a much higher chance of becoming abusers themselves in our own studies and in other people's studies that have been published.

The group of abusers are more likely to abuse others and the explanation for that is a couple of things.

Number one, there really is not a -- the abusers see themselves personalitywise as not harming

somebody else as they often see society is in the way of kind of a good thing or restricting their own behavior, and, therefore -- and in addition to that, they are more likely, most likely like most of us to treating their own kids or children the way that they have been treated, which is a fairly unconscious process that happens to most of us. They are most likely going to raise their kids or treat kids the way they were treated when they were younger.

Q What does the literature say about the perpetrators, things to that effect?

A The perpetrator pretty much believes -- they minimize the affects on children through a lot of denial processes where they

may often acknowledge for society or the world otherwise that this is not a good thing.

It is more -- I guess the analogy is it's more like a bad habit, like somebody who eats chocolate and knows it's not good for them. They really don't have a recognition that the abuse has long-term and short-term consequences on their victims.

Q Do they feel it is just -- that the children are harmed by the sexual abuse?

A Generally they do not.

Q Did you notice anything in Brad about whether he felt what he had done to the children harmed them?

A I was looking for that.

I did not find anything indicating that he felt he had harmed the children in any way.

Quite the contrary.

Q Did you see anything that would give you an impression that he expected harm to occur as a result of the sexual abuse to the Lerback children?

A No, sir.

His testimony, his deposition, description of how he treated the children, what his expectations were when he was with the, what he did, how he did it, and yesterday's behavior in the courtroom all indicated otherwise. All indicated he's not expecting harm to come.

Q The activities in the courtroom that you are referring to was -- what you referred to earlier in your testimony?

A There is two things in the courtroom.

One was his testimony on the witness stand where he answered the question about the intent to harm and clearly I found him -- I found his testimony to be credible, that he didn't intend to harm the children.

Secondly, the way -- throughout the morning -- I don't know if it was a recess -- a period of time where he approached the bench and expressed a desire to make his argument known to the Court about his own abuse, and he attempted to minimize the effect on the children.

Q Doctor, the fact that the abuse occurs numerous times over a period of time with intervals in between, would that lead to a conclusion that the abuser thinks

about the affects of his behavior on the victim?

A That would not lead me to that conclusion, no, sir.

Q Why not?

A Having time in between the abuses -- I mean there is time there, so there is time to reflect on that. Abusers, pedophiles, typically are, and in Bradley, his personality makeup is not of a personality type nor has he indicated he would use that time in a resourceful manner, meaning being reflective about his own behavior.

Quite the contrary. Very impulsive, very narcissistic and pedophile, those three things together would indicate a very habitual, particularly under

stress, behavior of sexual interests in children.

There is really no indication of reflective thinking process about his own behavior, that combined with his minimizing and expressing what he believes to be very minimal affects of sexual abuse on others.

My conclusions would be other than what you stated.

Q What about Brad's testimony in his deposition that he would tell himself that he didn't want it to happen again, that he didn't think any good could come from it?" Do you recall that sort of testimony?

A Yes, I recall that.

My impression of that professionally was pedophile BS.

Q What do you mean by pedophile BS?

A I mean that that is a typical response of pedophiles when interviewed or saying something to please others around them, has no relevance to or indication about change, actually changing behavior.

Quite the contrary. Under stress, pedophiles are more likely to act out again.

Q Now, you are aware that Brad was a victim of sexual abuse?

A Yes, sir.

PAGE 20:9-25:6

Q Were you able to observe Brad Purdy yesterday at the trial?

A Yes, sir.

Q Based on your observations and the testimony that you heard there, were you able to gain an impression, form an opinion regarding Brad Purdy's feelings

about the affect his own sexual molestation had on him?

A Yes sir.

Q What is that opinion?

A That he would really just describe it very minimally, that he used himself as an example to others as to how the sexual abuse really did not affect him very much, that he was a successful law student at this point in time.

Q Based on that observation and what you are able to gain from the MMPI and the other materials that you reviewed, would you say that Brad's first-hand knowledge of the affects on him of the sexual abuse would cause him then not to abuse others?

A No, sir.

May I explain?

Q Sure.

A First-hand knowledge, information, even insight for all of us about our behaviors doesn't necessarily lead to a change in behavior.

You can describe that very accurately.

I can tell you a lot of traits about myself that I don't like, but I don't necessarily translate that into being different so, just the knowledge or his intelligence or information about it wouldn't necessarily, in any way, affect the change in behavior, and it may affect a desire to, you know, to stop the behavior, and it may not.

PAGE 26:1-27:8

Q You have testified to Brad's perception of the affects of his

own sexual abuse on himself was that it was minimal.

How would that affect his own thinking about the affects his sexual abuse on others might have?

A Okay. Pedophiles generally minimize their behavior and interpret their affect on children differently than most of us.

In the case of Brad, the same thing applies.

In other words, he minimizes the affects on himself and also certainly believes that the affects are minimal if at all on children.

Most pedophiles actually believe their behavior may be of benefit. I don't now what about Brad. I believe from what I reviewed that

he believes the affects are minimal.

Q Does the fact that Brad Purdy may be average or above average intelligence in any way influences thinking about what affects the sexual abuse has on his victims?

A Pedophiles come in all colors and intelligence levels.
His level of intelligence wouldn't be related to his thought processes or feelings about abusing children.

PAGE 28:9-29:6

CROSS EXAMINATION BY MR. DIEBERT

Q So far as the intent issue goes, Brad Purdy obviously didn't intend to harm these children, did he?

A My belief is that he did not intend to harm the children.

PAGE 35:25-36:4

EXAMINATION BY THE COURT:

Doctor, I have just a couple questions. Both counsel have been putting it to you from their perspective in language that purports to deal on a legal basis here.

I want to make sure that I understand the nuts and bolts, I guess, of what you are saying and, then, later apply the legal test that has to be applied.

As I would understand your testimony this morning, not all sexual offenders are, say, in a mold; some more than others could intend or understand that their actions could cause harm even though they may try to minimize it or say the right thing to throw people off the track. For

example, you talk about the pedophile BS that was inherent in some of the studies and quantitatively what you have tried to do here is look at the material that was presented to you and determine where Mr. Purdy, in your opinion, would fit and what his actions were.

A Correct.

THE COURT: Someone else could look at the same situation and say he intended or he should have known whatever the case might be.

A Somebody else could say that. The discriminator that I didn't really talk about, in other words, Brad or another pedophile, if there was a diagnosis of psychotic, or if somebody had caused physical harm to the children, then, my argument would

be washed out, you know, and you find that most pedophiles will go to great lengths to tell you how they wouldn't ever bring harm to this child because they are coming from they think loving and also be a sexual way of wanting to relate to children. I would suspect that most people would give a pretty similar interpretation. Maybe not. I can't speak for other people.

THE COURT: I understand that.

PAGE 55:11-56:21

DIRECT EXAMINATION OF MICHAEL J. MCGRATH, Ph.D. BY MR. DIEBERT:

Q State your name, please.

A Michael J. McGrath.

Q How old are you?

A 43.

Q Are you employed?

A Yes I am.

Q Where?

A The VA Hospital, and I also have a private practice.

Q VA Hospital, where?

A Sioux Falls.

Q What is the nature of your work at the Veterans Administration and your private practice?

A I am a clinical psychologist, and my work basically consists of two phases, doing evaluations for various purposes and psychotherapy.

PAGE 59:16-60:16

Q Have you had any training, experience, or involvement in sexual abuse type of cases?

A Yes, I have.

Q What does that involve?

A Training has involved various workshops, training seminars that have been put on over the years.

The experience includes doing evaluations both for forensic purposes and for the Department of Social Services, and, also, I have worked with both victims and perpetrators of sexual abuse.

Q Of course, I have retained you in this litigation to evaluate, offer expert testimony concerning the issues here, particularly the conclusions, opinions, and testimony of Dr. McCall-Perez; is that right?

A Correct.

Q What have you reviewed before reaching your conclusions and opinions?

A The deposition given by Brad Purdy, affidavit of Dr. McCall-Perez, Dr. McCall-Perez's resume', statement given to the police by both Brad Purdy and

Christian Lerback, intake summary prepared by West River, transcript of the sentencing proceedings concerning Brad Purdy, and deposition given by Dr. McCall-Perez.

Q This is the same information that is reflected in Dr. McCall-Perez's affidavit of January 2, 1990; is that right? That is, I gave you the same information reflected in his affidavit?

A As I understand it, yes.

Q Of course, his deposition was taken after that, so that was the only addition, correct?

A right.

Q You have also heard the testimony of Dr. McCall-Perez here today, is that right?

A Yes, I have.

PAGE 61:2-62:10

Q Let me ask it in your professional opinion, are the conclusions, opinions, expressed by Dr. McCall-Perez valid on the issue of subjective intent or expectation in this sexual contact context?

A No, I do not agree with him.

Q What are your opinions, and why do you not agree?

A My opinion is that you really can't know -- I am uncertain whether Mr. Purdy had the expectation of some harm occurring or not.

There isn't substantiation for Dr. McCall-Perez's conclusions that there was, that he had no intent.

Another conclusion I had was that there are some factors which might lead one to think that Mr.

Purdy did have some expectation of harm.

PAGE 62:22-63:10

Q One of your conclusions was that there is insufficient data for Dr. McCall-Perez to reach his conclusions and opinions. What did you mean by that?

A The data that he had, you just can't draw those conclusions from it. It is insufficient.

PAGE 64:5-9

CROSS EXAMINATION BY MR. KNUDSEN:

Q With regard to your testimony about there being insufficient data on which Dr. McCall-Perez could base his conclusions, do you recall your deposition being taken a couple nights ago, Wednesday, January 24, 1991?

A Correct.

Q At that time, I asked you about that opinion, about the lack of substantiation, your allegation that there was a lack of substantiation?

A Correct.

PAGE 68:23-69:6

Q Had there been sufficient data available, it very well could have supported Dr. McCall Perez's conclusions, couldn't they?

MR. DIEBERT: Objection. Speculation and conjecture.

THE COURT: Overruled.

THE WITNESS: I would expand upon that answer. That would help, yes.

Q It could very well support Dr. McCall-Perez's conclusions, couldn't they?

A Or refute it.

Q But you don't know?

A I don't know.

PAGE 69:24-70:11

Q It is possible -- you say that it is possible that Mr. Purdy did not intend to harm those victims at the time these acts occurred?

A That is possible.

Q And it is possible that he did not expect any harm to come?

A That is possible.

PAGE 71:22-72:3

CROSS EXAMINATION BY MR. SCHLAUGER:

Q Dr. McGrath, I might have just one quick question, if I can just clear this up.

What Mr. Knudsen was asking you, again, it is very possible that Brad Purdy did not intend to harm the victims, is it not?

A Very possible.

PAGE 72:13-18

RECROSS EXAMINATION BY MR. KNUDSEN:

Q Well, I don't recall at the end whether your answer was to the

expectation question it is possible that Brad did not expect harm to occur, and I believe your answer was yes?

A At this point, I don't think we can know what his expectations or intentions were, but it is equally possible he did or he didn't.

PAGE 73:14-10

STATE OF SOUTH DAKOTA
COUNTY OF PENNINGTON

IN CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT

File No. 88-1209

COURT'S DECISION

****

AMERICAN FAMILY MUTUAL
INSURANCE COMPANY,

Plaintiff,
vs.

BRADLEY ALAN PURDY; DAVID
LERBACK and JANI LERBACK,
and DAVID LERBACK as Guardian
ad Litem of CHRISTIAN LERBACK
and ANDREW LERBACK, Minors,

Defendants.

****

* * *

THE COURT: I will further state for the record that I have had an opportunity to continue to work on the file throughout the proceedings, largely due to the nature of the declaratory judgments in front of me, and the civil lawsuit in front of Judge Konenkamp, and counsel kept me well advised

throughout the proceedings of the status of that case as well.

I have had the opportunity, since the Court trial this morning, to consider all the exhibits that were received. Counsel and I at lunch were able to develop the transcripts that became exhibits 5 and 6, and I have had a chance to examine them as well as the deposition of Dr. McGrath as Mr. Deibert had furnished me at noon. I don't intent to enter a written decision in this matter. The oral pronouncement encompasses the findings and conclusions such as they are.

Counsel, I would invite you to submit written findings and conclusions pursuant to statute unless you intend to waive them.

The sole question presented here, I guess, is centered around the expected or intended language contained in the policy of insurance stipulated to by counsel to

have been in effect at the time of the actions by Mr. Purdy. That is contained, of course, in exhibits 1 and 2.

With that is the question of whether or not coverage is provided and American Family's duties to the defense. Understanding this has already taken place before Judge Konenkamp, a verdict rendered, I would assume with reservation of rights on the defense, none of which enter into the equation here based on the outcome of that case.

I will also state, as I am about to rule, I have no particular desire to affect the outcome of either this case or the case in front of Judge Konenkamp one way or the other.

I have considered carefully the excellent briefing that has been done here and, doug, your continued updated list of jurisdiction rulings that as a matter of law in these types of cases that anyone

with a clear mind essentially should understand that severe consequences befall a victim of sexual abuse, and that it certainly would fit within the exclusion of the expected or intended language particularly included in exhibits 1 and 2. Having, and without reciting each and every one of the cases, I know I will see them in findings or they will be presented to the Supreme Court, testimony this morning presented by Dr. McCall-Perez, I frankly find to be more credible than the testimony of Dr. McGrath. Both of them I feel testified honestly from their perspective. Dr. McGrath as a matter of fact at one point on questioning indicated that he was uncertain whether Mr. Purdy had an intention or an expectation of causing harm.

I am well aware of the rulings and the summary reversals by Courts of

appeal, and fully expect that that may well be the case in South Dakota.

It is a case of first impression here.

There is just something in my reading and interpreting what is presented to me when you have a matter that is subject to expert testimony and particularly in dealing with actions of the human mind that I can't find as a matter of law that there is an intention to cause harm in this instance.

In looking at general overall legal principles in our state, of course, insurance policies are construed strictly against the draft person or, in this case, against American Family.

Given their clear meaning, and there is nothing unclear about the language of expected or intended, I have no quarrel with exclusions in policies such as this.

The question here is whether or not the actions at issue come within the exclusionary language, and it is the measuring of those actions taken place here, not whether the policy is deficient or against sound principles of law, anything of that sort.

Examining the case that you presented, also, this noon, Mr. Deibert, the new case by our Supreme Court in December involved an error an errors and omissions situation. There, again, I think the ruling is right in that instance as to the City going ahead and constructing their roadway across the slough, an intentional act.

I just can't find from the evidence that is presented here the intent on Mr. Purdy's part to cause the harm.

The action was tried before Judge Konenkamp on a theory of negligent infliction of emotional distress.

I have reviewed the cases in South Dakota involving emotional distress and intentional tort, the subsequent case of Wright v. Coca-Cola Bottling Company, and I feel that this case comes more within the parameters of the Wright case in a negligent infliction of emotional distress.

Therefore, it would be the finding of the Court that the exclusionary language does not apply in this instance; that American Family is required by the terms of its policy to extend coverage for any damage as a result of Mr. Purdy's actions.

Is there any additional record that either of you want to make, counsel?L

Mr. Deibert: No, your Honor.

Mr. Knudsen: No, your Honor.

Mr. Schlauger: No, your Honor.

THE COURT: Okay.

STATE OF SOUTH DAKOTA
COUNTY OF PENNINGTON

IN CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT

File No. 88-1209

JUDGMENT

****

AMERICAN FAMILY MUTUAL
INSURANCE COMPANY,

Plaintiff,
vs.

BRADLEY ALAN PURDY; DAVID
LERBACK and JANI LERBACK,
and DAVID LERBACK as Guardian
ad Litem of CHRISTIAN LERBACK
and ANDREW LERBACK, Minors,

Defendants.

****

This action having come on for trial before the Court sitting without a jury at the Pennington County Courthouse, Rapid City, South Dakota, at 9:00 o'clock a.m. on January 25, 1991; and

Plaintiff having appeared by its counsel Douglas M. Deibert of Cadwell, Sanford & Deibert, Sioux Falls, South

Dakota; Defendant Bradley Purdy having appeared by his attorney, Rodney Schlauger of Bangs, McCullen, Butler, Foye & Simmons, of Rapid City, South Dakota; and Defendants David Lerback and Jani Lerback and David Lerback as Guardian ad Litem of Christian Lerback and Andrew Lerback having appeared by their counsel, Donald P. Knudsen of Gunderson, Palmer, Goodsell & Nelson, of Rapid City, South Dakota; and

The Court having entered Findings of Fact and Conclusions of Law;

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

That Plaintiff American Family Mutual Insurance Company is obligated to defend Defendant Bradley A. Purdy, and to indemnify him for any damages that may be adjudged in favor of David Lerback and Jani Lerback, and David Lerback as Guardian Ad Litem of Christian Lerback and Andrew Lerback, minors, relating to the

allegations of the Amended Complaint brought by the Lerbacks against Bradley Alan Purdy in Pennington County Case No. 88-903.

Dated at Rapid City, South Dakota, this 11th day of March, 1991.

BY THE COURT:

JEFF W. DAVIS
Circuit Court Judge

ATTEST:

_____
Clerk of Courts

By_____
Deputy
(SEAL)

STATE OF SOUTH DAKOTA
COUNTY OF PENNINGTON

IN CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT

File No. 88-1209

FINDINGS OF FACT AND CONCLUSIONS OF LAW

****

AMERICAN FAMILY MUTUAL
INSURANCE COMPANY,

Plaintiff,

vs.

BRADLEY ALAN PURDY; DAVID
LERBACK and JANI LERBACK,
and DAVID LERBACK as Guardian
ad Litem of CHRISTIAN LERBACK
and ANDREW LERBACK, Minors,

Defendants.

****

On April 7, 1988, David and Jani Lerback and David Lerback as Guardian ad Litem for Andrew and Christian Lerback ("Lerbacks") commenced a law suit against Bradley A. Purdy ("Purdy), seeking compensation for damages allegedly caused by Mr. Purdy's sexually fondling the Lerback boys. Mr. Purdy was an insured under a homeowner's insurance policy purchased by his parents

from American Family Mutual Insurance Company ("American Family"). American Family arranged for the defense of Mr. Purdy in the personal injury action under a reservation of rights. American Family Insurance Company subsequently commenced an action for declaratory relief on June 9, 1988. American Family contends that it has no obligation to defend Bradley A. Purdy nor indemnify him for any judgment which may be rendered against him because the conduct as alleged in the Lerbacks' complaint in the personal injury action falls within an exclusion from coverage contained in the Purdys' homeowner's insurance policy. American Family Mutual Insurance Company's declaratory judgment action was tried to the Court on January 25, 1991. Based upon the evidence introduced at trial and the evidence contained in the record before the Court,

the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT:

1. From 1982 through 1986, Bradley A. Purdy was an insured under the homeowner's insurance policies issued by American Family to Richard and Carolyn Purdy, Bradley A. Purdy's parents.

2. The homeowner's policies state that the coverage does not apply ". . . to **bodily injury** . . .: a. which is expected or intended by any **insured**. . .."

3. The sexual contact between Purdy and the Lerback children consisted of Purdy fondling the Lerback childrens' geritals. There was no evidence of any other type of sexual contact between Purdy and the Lerback children.

4. Purdy is a pedophile who suffers impulsive/compulsive behavior problems.

5. Purdy's impulsive/compulsive behavior, combined with his narcissistic

personality and his pedophile mentality caused Purdy to impulsively or compulsively act out sexually under circumstances where anxieties or fears became intense.

6. At those times when Purdy acted out sexually by fondling the Lerback children, he did so purely for his own sexual gratification.

7. Purdy believed that the fondling of the Lerback children was a form of love and friendship.

8. Purdy believed that the fondling of the Lerback children would actually benefit the children in the future, or that it certainly would not harm the children.

9. Due to a combination of his pedophile mentality and his compulsive/impulsive psychological nature, Purdy did not intend to injure the Lerback children.

10. Due to the combination of his pedophile mentality and his

compulsive/impulsive psychological nature, Purdy did not expect
that any injury would occur as a result of sexually fondling the Lerback children.

11. The facts and legal conclusions stated by the Court on January 25, 1991, announcing the judgment of the Court are incorporated in these findings of fact and conclusions of law by this reference.

CONCLUSIONS OF LAW:

1. The exclusion on which American Family relies applies only where the insured intends or expects injury.

2. "Insured" as defined and used within the policy exclusion relied upon by American Family in this case refers to Bradley A. Purdy.

3. The exclusion does not preclude coverage in this case because Bradley A. Purdy did not intend to inflict any type of injury upon the Lerback children nor did

Bradley A. Purdy expect that they would be injured as a result of his conduct.

4. American Family is obligated to defend Bradley A. Purdy and to pay up to the policy limits for any judgment which may be rendered against Purdy in the underlying personal injury action which the Lerbacks have commenced against him.

Dated this 11th day of March, 1991.

BY THE COURT:

JEFF W. DAVIS
Circuit Court Judge

ATTEST:

_____
Clerk of Courts

By_____
Deputy

(SEAL)

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

APPEAL NO. 17507

AMERICAN FAMILY MUTUAL
INSURANCE COMPANY,

Plaintiff and Appellant,

vs.

BRADLEY ALAN PURDY, DAVID
LERBACK and JANI LERBACK, and
DAVID LERBACK as Guardian ad
Litem of CHRISTIAN LERBACK and
ANDREW LERBACK, Minors,

Defendants and Appellees.

APPEAL FROM THE CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT
PENNINGTON COUNTY, SOUTH DAKOTA

THE HONORABLE JEFF W. DAVIS
CIRCUIT COURT JUDGE PRESIDING

BRIEF OF APPELLEES, DAVID LERBACK and JANI LERBACK, and DAVID LERBACK as Guardian ad Litem of CHRISTIAN LERBACK and ANDREW LERBACK, Minors

NOTICE OF APPEAL FILED APRIL 18, 1991

PAGES 37-47:

I. INFERRING AN INTENT TO INJURE AS A MATTER OF LAW IN CASES INVOLVING SEXUAL ABUSE DENIES DUE PROCESS OF LAW TO PERPETRATORS WHO DO NOT INTEND INJURY AND DO NOT EXPECT THAT INJURY WILL OCCUR.

If the South Dakota Supreme Court follows the line of reasoning which infers an intent to injure or an expectation of injury as a matter of law in sexual abuse cases, insured who do not intend or expect injury would be deprived of their property rights without due process of law. Such a deprivation would be an unconstitutional violation of the rights guaranteed by Fifth and Fourteenth Amendments to the United States Constitution, and Article VI § 2 of the South Dakota Constitution.

A. AN INSURED HAS A PROPERTY INTEREST IN INSURANCE COVERAGE AND PROCEEDS.

The first step in analyzing whether there will be a procedural due process violation is to determine whether a liberty or property interest is involved. Board of Regents v. Roth, 408 U.S. 564, 92 S. Ct.

2701 (1972); Carlson v. Hudson, 277 N.W.2d 715, 718 (S.D. 1979). United States Supreme Court has defined the term "property interest" as follows:

> "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims."

Roth, 408 U.S. at 577, 92 S. Ct. at 2709 (emphasis added).

The United States Supreme Court has further fleshed out the skeleton of procedural due process with the following language.

> [A] person's interest in a benefit is a "property" interest for due process purposes if there are . . . rules

> or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing.

Bishop v. Wood, 426 U.S. 341, 344, n. 6, 96 S. Ct. 2074, 2077 (1976), quoting Perry v. Sindermann, 408 U.S. 593, 92 S. Ct. 2694 (1972).

An insured under the terms of an insurance policy which provides coverage for bodily injury has a legitimate claim of entitlement to insurance protection by virtue of the contract of insurance. As the South Dakota Supreme Court recognized in Carlson, a contractual provision can give rise to a claim of entitlement which may not be deprived without due process. Carlson, 277 N.W.2d at 719. See also, Gray Panthers v. Schweiker, 652 F.2d 146, 148, n. 2 (D.C. Cir. 1981) (claimant's interest in receiving medical insurance benefits for which they had paid a monthly premium was a

property interest); Fayle v. Stapley, 607 F.2d 858, 861 (9th Cir. 1979) (interest in disability insurance benefits represent substantial property interests to which due process protection must be afforded).

To summarize, an insured under the terms of an insurance policy has a legitimate claim of entitlement to insurance benefits. The insured cannot be deprived of that property right without due process of law.

B. A RULE OF LAW WHICH INFERS AN INTENT OR EXPECTATION OF INJURY AS A MATTER OF LAW IN ALL CASES OF SEXUAL ABUSE DESPITE THE EXISTENCE OF EVIDENCE REFUTING SUCH INTENT OR EXPECTATION WOULD DEPRIVE INSUREDS OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW.

1. The language of the policy exclusion requires focus on the insured's subjective intent.

As demonstrated previously in this brief, the language of the insurance policy in this case requires the court to determine whether the insured subjectively

intended or expected injury. Rodriguez, 729 P.2d at 630.

2. Inferring an intent to injure or an expectation of injury from the very nature of the sexual contact creates an irrebuttable presumption.

The line of reasoning which infers an intent to harm as a matter of law from the very nature of the sexual contact makes evidence of the insured's subjective intent irrelevant. State Farm Fire and Casualty Company v. Smith, 907 F.2d 900, 903 (9th Cir. 1990) (intent to harm may be inferred from sexual contact with a minor as a matter of law, irrespective of the intent of the insured). See also Rodriguez, 729 P.2d at 629. Thus, although the language of the policy requires the court to inquire into the insured's subjective intent, adoption of this approach eliminates the need for any such inquiry. Id.

Courts applying this analysis have created an irrebuttable presumption that in every case of sexual abuse the perpetrator intends to injure his victim or expects that the victim will be injured due to the very nature of the act. State Farm Fire and Casualty Company v. Abraio, 874 F.2d 619, 623 (9th Cir. 1989) (the presumption of intent to harm is irrebuttable). This irrebuttable presumption denies the insured his property interest in insurance coverage without due process of law.

3. Irrebuttable presumptions are unconstitutional when the presumption is not necessarily or universally true in fact.

The United States Supreme Court has consistently struck down irrebuttable presumptions under circumstances where the presumption is not necessarily or universally true in fact and when there are alternative reasonable means for making the

determination. Vlandis v. Kline, 412 U.S. 441, 93 S. Ct. 2230 (1973); Cleveland Board of Education v. LaFleur, 414 U.S. 632, 94 S. Ct. 791 (1974); Stanley v. Illinois, 405 U.S. 645, 92 S. Ct. 1208 (1972).

In Vlandis, the court considered whether a Connecticut statute which created an irrebuttable presumption that a person would be considered an "non-resident" for the entire time the person was enrolled in a Connecticut State University if, at the time the person applied for admission to the University, his legal address was out-of-state. Vlandis, 412 U.S. at 442-43, 93 S. Ct. at 2231-32. The United States Supreme Court struck down the irrebuttable presumption because it violated the due process clause as it provided no opportunity for students who applied from out-of-state to demonstrate that they subsequently became bona fide Connecticut residents. Id. at 453, 92 S. Ct. at 2237.

In discussing the constitutionality of irrebuttable presumptions, the court cited a string of cases holding that statutes which created a presumption operated to deny a fair opportunity to rebut the presumption violated the due process clause of the Fourteenth Amendment. Id. at 446, 92 S. Ct. at 2233. The court held that although Connecticut had an interest in easing its administrative burden in determining residency for purposes of calculating tuition, that interest was not sufficient to rescue the irrebuttable presumption from invalidity under the due process clause where there were other reasonable and practicable means of establishing the pertinent facts. Id. at 451, 93 S. Ct. at 2236. The court summarized by stating:

> [I]t is forbidden by the Due Process Clause to deny an individual the resident rates on the basis of a permanent and

> irrebuttable presumption of non-residents, when that presumption is not necessarily or universally true in fact, and when the state has reasonable alternative means of making the crucial determination. Rather standards of due process require that the state allow such an individual the opportunity to present evidence showing that he is a bona fide resident entitled to the in-state rates.

Id. at 452, 93 S. Ct. at 2236.

One year later, the United Supreme Court followed the Vlandis reasoning when it rendered the LaFleur opinion. Cleveland Board of Education v. LaFleur, 414 U.S. 632, 94 S. Ct. 791 (1974). That case involved a school board policy which imposed on pregnant teachers a mandatory leave without pay, beginning five months before the expected birth of their child. Id. at 634-38, 94 Sup. Ct. 794-95. Several teachers filed suit against the

school board challenging the constitutionality of the maternity leave rule. Id.

The United States Supreme Court recognized that some teachers do indeed become physically disabled from effectively preforming their duties during the later stages of pregnancy. Id. at 644, 94 Sup. Ct. at 798. Nevertheless, that fact alone did not justify an irrebuttable presumption that all teachers become disabled during the later stages of pregnancy. Id.

> But the question is whether the rules sweep too broadly. [Cite omitted] That question must be answered in the affirmative, for the provisions amount to a conclusive presumption that every pregnant teacher who reaches the fifth or sixth month of pregnancy is physically incapable of continuing. There is no individualized determination by the teacher's doctor - or the school board's - as to any particular teacher's ability to

> continue at her job. The rules contain an irrebuttable presumption of physical incompetency, and that presumption applies even when the medical evidence as to an individual women's physical status might be wholly to the contrary.

Id. at 644, 94 S. Ct. at 798. The court reiterated its observation that permanent irrebuttable presumptions have long been disfavored under the Due Process Clause of the Fifth and Fourteenth Amendments to the United States Constitution. Id.

To further illustrate the point, the court cited the case of Stanley v. Illinois, 405 U.S. 645, 92 S. Ct. 1208 (1972). That case involved the constitutionality of an irrebuttable presumption in the state of Illinois that unmarried fathers were incompetent to raise their children. Under the Illinois provision, the state took custody of illegitimate children upon the death of

their mother, without allowing the father to attempt to prove his parental fitness. The Stanley court stated:

> "It may be, as the state insists that most unmarried fathers are unsuitable and neglectful parents. It may also be that Stanley is such a parent and that his children should be placed in other hands. But all unmarried fathers are not in this category; some are wholly suited to have custody of their children."

Id. at 654, 92 S. Ct. at 1214 (footnotes omitted) (emphasis added).

These cases establish beyond dispute that an inflexible irrebuttable presumption violates the Due Process Clause of the United States Constitution and the South Dakota Constitution when such a presumption is not necessarily or universally true in fact and when there is a reasonable alternative means of making the crucial determination. LaFleur, 414

U.S. at 644-45, 94 S. Ct. at 798; Vlandis, 412 U.S. at 452 93 S. Ct. at 2236. Just as it was not universally true that all pregnant teachers cannot competently teach beyond the fourth month of pregnancy, and that all unmarried fathers are incompetent parents, so it is also not universally true that all perpetrators of sexual abuse intend to injure their victims or expect that harm will occur. See generally, Gebhard, Gagman, Palmeroy, et al, Sex Offenders, (Harper & Rowe, 1965). While it may be true in some cases, it is not true in all cases. Application of a rule of law holding that all perpetrators of sexual abuse intend or expect to injure their victims would deprive those pedophiles who do not harbor such intentions or expectations their property interest in insurance coverage without due process of law. These insureds would not be given a

fair opportunity to prove that they did not intend or expect to injure their victims.

4. Reasonable alternative means exist for determining whether an insured intends or expects injury.

Because it is not necessarily or universally true that all perpetrators intend or expect injury to their victims, a presumption to that effect would "sweep too broadly". LaFleur, 414 U.S. at 644, 94 S. Ct. at 798. This is particularly true because reasonable alternative means exist for determining an insured's intent and expectations.

American Family followed the correct procedure for determining whether its insured intended or expected injury to the Lerback children in this case. The proper procedure is found in the Uniform Declaratory Judgments Act located at SDCL Ch. 21-24. The provisions contained in the Uniform Declaratory Judgments Act provide that issues of fact - and issues of an

insured's intent are issues of fact, Ahl, 388 N.W.2d at 534 - can be tried and determined in the same manner as issues of fact are tried and determined in other civil actions. SDCL 21-24-9. That is precisely how the trial court reached its determination in this case.

Under the procedures set forth in the Uniform Declaratory Judgments Act, an insurer can attempt to prove that it should not be required to defend or indemnify an insured who has intended or expected the injury for which a claim is being made. These procedures ensure that an insured is not deprived of insurance coverage - a legitimate property interest - without due process of law. Both parties are given a fair opportunity to establish the facts rather than having a court invoke a fiction which is not necessarily or universally true.

5. Courts do not automatically infer intent or expectation

in cases involving other types of assaults.

In determining the applicability of the intentional injury exclusion in the context of other types of assaults, courts have not adopted such an inflexible, automatic inference regarding an insured's intentions or expectations. See Annotation, Construction and Application of Provision of Liability Insurance Policy Expressly Excluding Injuries Intended or Expected by Insured, 31 A.L.R. 4th 957 (1984). Rather, courts consider each case on its facts because in some circumstances, an insured may not intend or expect injury although the nature of the act itself, without further analysis, would lead to that conclusion. Id.

#17507-r-RWS

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

* * * *

AMERICAN FAMILY MUTUAL
INSURANCE COMPANY, Plaintiff
and Appellant,

vs.

BRADLEY ALAN PURDY; D.L. and
J.L., and D.L. as Guardian
ad Litem of C.L. and
A.L., Minors, Defendants
and Appellees.

* * * *

APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTH JUDICIAL CIRCUIT
PENNINGTON COUNTY, SOUTH DAKOTA

* * * *

HONORABLE JEFF W. DAVIS
Judge

* * * *

DOUGLAS M. DEIBERT
CADWELL, SANFORD & DEIBERT
Attorneys for plaintiff
and appellant
Sioux Falls, South Dakota

DONALD P. KNUDSEN
GUNDERSON, PALMER, GOODSELL,
& NELSON
Attorneys for defendants and appellees
Rapid City, South Dakota

PATRICK K. DUFFY
RODNEY W. SCHLAUGER
BRADLEY (sic), McCULLEN,
BUTLER, FOYE & SIMMONS
Attorneys for defendant
and appellee Purdy
Rapid City, South Dakota

* * * *

ARGUED December 3, 1991

OPINION FILED March 25, 1992

#17507

#17507

SABERS, Justice

Insurer (American Family) appeals a determination that it has a duty to defend and to pay for expected or intended injury arising from sexual contact. We reverse.

FACTS

Bradley Purdy (Purdy) sexually molested A.L. on approximately fifteen occasions when A.L. was between 4 and 6 years of age. Purdy also sexually molested C.L., A.L.'s older brother, on three occasions. The molestation of both children consisted of Purdy fondling their genitals, there was no evidence of any oral or anal penetration.

These incidents occurred in Rapid City, South Dakota, during a time period when Purdy was a student at Brigham Young University in Provo, Utah. He also spent a period of time in Germany. However, Purdy considered himself a resident of his

parents' household in Rapid City. Thus, Purdy meets the definition of "insured" under his parents' homeowner's policy.

A.L. described four of the incidents with Purdy. Three occurred in the children's home with Purdy shutting the bedroom door, sitting against it with A.L. between his legs and then rubbing A.L.'s genitals for about 10 minutes. Each of the four described incidents ended with Purdy asking A.L. if it felt good, to which A.L. responded "No." On the final described incident Purdy threatened A.L. not to tell his parents. Purdy followed a similar pattern with C.L. and on one occasion, although no apparent threats were made, Purdy asked C.L. if he were okay.

Purdy was criminally prosecuted for these acts in 1986. Purdy received a suspended imposition of sentence and satisfied the terms imposed by the court.

The children's parents (Parents) filed this civil action in their own right and as guardians of the children against Purdy and his parents.[1] Parents alleged that Purdy "negligently and without the intent to harm, touched and fondled the [children] in an indecent manner."

American Family brought a declaratory judgment action claiming it had no duty to defend or indemnify Purdy for the claims contained in the complaint. American Family twice moved for summary judgment and both motions were denied. A court trial was held. The issue was whether the policy, which excluded coverage for any bodily injury which is either "expected or intended" by the insured, provided coverage and a duty to defend.

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[1]. Purdy's parents were dismissed on summary judgment.

The testimony of psychologist Dr. Fred McCall-Perez, was offered to dispute the allegation that Purdy intended to harm the children as a result of his conduct. Dr. McCall-Perez testified that in his opinion, Purdy did not intend to injure nor expect his conduct to harm the children. This opinion was based upon his determination that Purdy has a very narcissistic or self-centered personality, that Purdy felt the history of his own abuse had not affected him in any adverse way, that Purdy's pedophile behavior was unconscious - similar to a bad habit, and that Purdy viewed his acts as an expression of love.

American Family offered the testimony of psychologist Dr. Michael McGrath to challenge the opinion of Dr. McCall-Perez. Dr. McGrath testified that there was insufficient foundation to determine Purdy's expectations or intent. However,

Dr. McGrath testified that it was equally possible that Purdy expected or intended harm as it was that no expectation or intent of harm existed. The testimony of Purdy, A.L. and C.L. was received by deposition. The court found that not only did Purdy not expect or intend to harm the children, but that to Purdy, the fondling was a form of love and would benefit the children.[2] The court concluded that

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[2]. The trial court's Findings of Fact:

. . .

5. Purdy's impulsive/compulsive behavior, combined with his narcissistic personality and his pedophile mentality caused Purdy to impulsively or compulsively act out sexually under circumstances where anxieties or fears became intense.

. . .

7. Purdy believed that the fondling of the . . . children was a form of love and friendship.

American Family was obligated to defend Purdy and to pay up to policy limits for any judgment rendered against him. American Family appeals, claiming the court erred in denying summary judgment and erred as a matter of law in concluding that the policy exclusion did not apply.

1. EXPECTED OR INTENDED INJURY

The question is whether the trial court erred or was clearly erroneous in determining that Purdy neither expected or intended harm from his sexual contacts with the children. The homeowner's policy, under which Purdy is an insured, ccntains a provision excluding coverage for "bodily injury or property damage . . . which is expected or intended by any insured." When

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8. Purdy believed that the fondling of the . . . children would actually benefit the children in the future, or that it certainly would not harm the children.

an insurer seeks to invoke a policy exclusion as a means of avoiding coverage, the insurer has the burden of proving that the exclusion applies. Western Cas. & Sur. Co. v. Anderson, 273 N.W.2d 203, 205 (S.D. 1979). For the exclusion to apply in this case, it must be shown that Purdy expected or intended injury to the children - not merely the acts of molestation.

> It surely is not the act of the insured which must be expected or intended for the [exclusion] to take effect.

Tri-State Co. of Minnesota v. Bollinger, 476 N.W.2d 697, 701 (S.D. 1991) (emphasis original).

The majority of jurisdictions that have addressed this issue have held that through the very nature of acts of criminal sexual contact or rape, injury is either inherent or the intent to injure will be inferred as

a matter of law.[3] In Western Nat. Assur.

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[3]. See, e.g., State Farm Fire & Cas. Co. v. Smith, 907 F.2d 900 (9th Cir. 1990); Foremost Ins. Co. v. Weetman, 726 F.Supp. 618 (W.D.Pa. 1989); Allstate Ins. Co. v. Thomas, 684 F.Supp. 1056 (W.D.Okla. 1988); Allstate Ins. Co. v. Roelfs, 698 F.Supp. 815 (D.Alaska 1987); Allstate Ins. Co. v. Foster, 693 F.Supp. 886 (D.Nev. 1988); Allstate Ins. Co. v. Jack S., 709 F.Supp. 963 (D.Nev. 1989); CNA Ins. Co. v. McGinnis, 666 S.W.2d 689 (Ark. 1984); Twin City Fire Ins. Co. v. Doe, 788 P.2d 121 (Ariz.App. 1989); J.C. Penney Cas. Ins. Co. v. M.K., 804 P.2d 689 (Cal. 1991); Allstate Ins. Co. v. Troelstrup, 789 P.2d 415 (Colo. 1990); Landis v. Allstate Ins. Co., 546 So.2d 1051 (Fla. 1989); Allstate Ins. Co. v. Jarvis, 393 S.E.2d 489 (Ga.App. 1990); Roe v. State Farm Fire & Cas. Co., 373 S.E.2d 23 (Ga.App. 1988); Scudder v. Hanover Ins. Co., 559 N.E.2d 559 (Ill.App. 2 Dist. 1990); Altena v. United Fire & Cas. Co., 422 N.W.2d 485 (Iowa 1988); Perreault v. Maine Bonding & Cas. Co., 568 A.2d 1100 (Me. 1990); Harpy v. Nationwide Mutual Fire Ins., 545 A.2d 718 (Md.App. 1988); Worcester Ins. v. Fells Acres Day School, 558 N.E.2d 958 (Mass. 1990); State Mut. Ins. Co. v. Russell, 462 N.W.2d 785 (Mich.App. 1990); Auto-Owners

Co. v. Hecker, 719 P.2d 954, 960 (Wash.App.

Ins. Co. v. Gardipey, 434 N.W.2d 220 (Mich.App. 1988); Linebaugh v. Berdish, 376 N.W.2d 400 (Mich.App. 1985); Estate of Lehmann by Lehmann v. Metzger, 355 N.W.2d 425 (Minn. 1984); State Farm Fire & Cas. Co. v. Williams, 355 N.W.2d 421 (Minn. 1984); Horace Mann Ins. Co. v. Ind. Sch. Dist., 355 N.W.2d 413 (Minn. 1984); Fireman's Fund Ins. Co. v. Hill, 314 N.W.2d 834 (Minn. 1982); Illinois Farmers Ins. Co. v. Judith G., 379 N.W.2d 638 (Minn.App. 1986); Mutual Service Cas. Ins. Co. v. Puhl, 354 N.W.2d 900 (Minn.App. 1984); New Hampshire Ins. Group v. Strecker, 798 P.2d 130 (Mont. 1990); State Farm Fire & Cas. v. van Gorder, 455 N.W.2d 543 (Neb. 1990); Vermont Mut. Ins. Co. v. Malcolm, 517 A.2d 800 (N.H. 1986); Atlantic Employers Ins. Co. v. Tots & Toddlers, 571 A.2d 300 (N.J. Super.A.D. 1990) cert. denied, 584 A.2d 218 (N.J. 1990); Western Nat. Assur. Co. v. Hecker, 719 P.2d 954 (Wash.App. 1986); Rodriguez by Brennan v. Williams, 713 P.2d 135 (Wash.App. 1986); Horace Mann Ins. Co. v. Leeber, 376 S.E.2d 581 (W.Va. 1988); N.N. v. Moraine Mut. Ins. Co., 450 N.W.2d 445 (Wis. 1990); K.A.G. by Carson v. Stanford, 434 N.W.2d 790 (Wis.App. 1988).

1986), the court held "that an act of forcible oral intercourse is an act of such a character that an intent to cause injury can be inferred as a matter of law." (emphasis original). The exclusion in the perpetrator's homeowner's policy stated that coverage would not extend to "liability . . . caused intentionally by . . . any insured." Id. at 957. In Rodriguez by Brennan v. Williams, 713 P.2d 135 (Wash.App. 1986) two cases were consolidated for appeal. Both cases dealt with father/stepfather's sexual contact with his child/stepchild. The court held that "[a]cts of this nature are of such a character that an intention to inflict injury can be inferred as a matter of law." Id. at 138. Both policies in Rodriguez excluded coverage for injury "expected or intended." Id. at 137.

In CNA Ins. Co. v. McGinnis, 666 S.W.2d 689 (Ark. 1984), the insured/stepfather sexually assaulted and abused his stepdaughter. The court, in holding that the exclusion applied stated "that for a stepfather in such a situation 'to claim that he did not intend to cause injury, flies in the face of all reason, common sense and experience.'" Id at 691. In Vermont Mut. Ins. Co. v. Malcolm, 517 A.2d 800 (N.H. 1986), the court held that the sexual assault committed by the insured on an 11-year old boy was not an "occurrence" within the policy and therefore not covered.[4] In reaching this conclusion, the court stated:

> The assaults were inherently injurious in the most obvious sense that they could not be performed upon a boy without appalling effects on his mind as well as forbidden

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[4]. By so holding, the Vermont Mut. court did not address the policy provision excluding coverage for expected or intended injury.

contacts with his body. This common understanding of the nature of such acts is beyond reasonable dispute and consistent with the legislative classifications of the acts within the most serious category of sex offenses[.]

Id. at 802-3 (citations omitted).

In Linebaugh v. Berdish, 376 N.W.2d 400 (Mich.App. 1985), the court held that:

[E]ngaging in sexual penetration with an underage female would be an . . . (intentional act) and the intent to injure or harm can be inferred as a matter of law from the alleged sexual penetration of said child. Thus, the exclusion in the insurance policy applies to the facts in the instant case.

Id. at 405. The homeowner's policy in Linebaugh contained the exclusion for "injury . . . intentionally caused by . . . the Insured." Id. at 402. In Fireman's Fund Ins. Co. v. Hill, 314 N.W.2d 834 (Minn. 1982), the court held that criminal sexual contact by the insured with a foster child" was such that an intention to inflict injury can be inferred as a matter of law." Id. at 835. Therefore, the Hill

court held that the policy provision excluding "bodily injury . . . which is either expected or intended from the standpoint of the insured" applied. Id.

Generally, the matter of coverage should be determined on a case by case basis as a question of fact after a consideration of all competent evidence by the fact finder. The classic statement of the fact finding process appears in Shook v. Tinny, 461 N.E.2d 642 (Ill. App. 3 Dist. 1984), as follows:

> The circumstances under which the act in question was done usually serve to manifest to a greater degree the intent of the actor and may overcome his declaration as to his intention, but he has the right to testify to his intention and to have the circumstances surrounding the act considered in connection with his testimony.

Id. at 646 (quoting People v. Biella, 28 N.E.2d 111, 112 (Ill. 1940)). However, the majority view in criminal sexual contact cases is to infer, as a matter of law, that

harm was expected or intended. We find the majority position persuasive.

Purdy claims that the recent case of Tri-State, is dispositive in this case. Purdy claims that this policy language and Tri-State establish that the court must determine whether the injury, rather than the act, was expected or intended from the standpoint of the insured. Although Purdy is correct under this policy language, this issue is determined from all the acts and conduct of the insured and not simply from his after the fact statements as to his expectations or intentions.[5]

We agree with American Family that Tri-State is factually distinguishable from

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[5]. Although we agree that the factual question is one of insured's intent, we do not agree that insured's own testimony must be considered conclusive on the issue under the circumstances of this case. Shook, 461 N.E.2d at 645.

this case. Tri-State involved a spur of the moment fight between two former friends both of whom had been drinking. The host attempted to remove the guest from his home by striking him, a fight ensued which eventually resulted in a broken ankle for the guest - a result which may have been unexpected or unintended from an 'intentional blow. In contrast, this case involves repeated deliberate sexual contacts with young boys over a four year period. American Family argues that if injury was not intended in the strict sense, at the very least, injury, adverse consequences, emotional stress, or other harm is certainly expected by a child molester.

In examining the facts of this case, we note that: Purdy was an intelligent young man, who graduated from high school with honors. As a freshman at B.Y.U. he had a

grade point average of 3.2. He was a victim of sexual contact himself when he was 10 to 11 years old. He stated that his prior victimization caused him considerable mental pain over the years including guilt, fear, shame and embarrassment. He could never bring himself to discuss this with his parents, despite what he considered a good relationship.

When initiating sexual contact with the children, Purdy thought about his own experiences. Following each contact with the children, he told himself he wouldn't and shouldn't do it again. Purdy stated that he knew no good would result from these contacts with the children - either for himself or for them. In addition, as indicated above, Purdy closed and blocked the door and then held and sexually abused the children. He also bribed or threatened them not to tell their parents and, at the

conclusion of one incident, inquired whether C.L. was okay. Purdy's testimony was received by way of deposition.

> We have repeatedly held that the clearly erroneous rule does not apply to evidence presented by a deposition or other means where the witness does not appear before the trial judge. There is no presumption in favor of the trial court's determination. It is our duty to review the evidence and determine the issues involved as though presented here in the first instance.

State v. Abourezk, 359 N.W.2d 137, 142 (S.D. 1984) (citations omitted). Therefore, despite the testimony of Purdy and the Affidavit of Dr. McCall-Perez, it is clear that Purdy was aware of the harmful effects of such conduct. In addition, Purdy cannot claim a version of the facts more favorable to himself than his own testimony. Trammell v. Prairie States Ins. Co., 473 N.W.2d 460, 463 (S.D. 1991); Waddell v. Dewey County Bank, 471 N.W.2d 591, 595 n. 3 (S.D. 1991); Miller v. Stevens, 256 N.W. 152, 155 (S.D. 1934).

The trial court's memorandum opinion stated that summary judgment would be proper only if as a matter of law it could rule that Purdy expected or intended harm to the children. The court stated that based upon Purdy's testimony, that he did not intend to harm the children, and upon the Affidavit of Dr. McCall-Perez, in which he stated Purdy "does not intend to harm the victims of his act," a genuine issue of material fact existed - i.e. whether Purdy expected or intended to harm the children through his actions. Although the trial court's analysis is correct under our summary judgment cases, Groseth Intern., Inc. v. Tenneco, Inc., 410 N.W.2d 159, 164 (S.D. 1987); Wilson v. Great Northern Railway. Co., 157 N.W.2d 19, 21 (S.D. 1968), we carve an exception to this general rule for criminal sexual contact

cases and infer as a matter of law that harm was expected or intended.

We rule that this insured either expected or intended injury to these victims from his sexual contact with them. Therefore, despite the testimony of Purdy and the Affidavit of Dr. McCall-Perez, we hold these acts of criminal sexual contact are of such a nature that the intent to inflict bodily injury will be inferred as a matter of law. The exclusion for bodily injury either "expected or intended" in this policy applies to these facts. Since the exclusion applies, there is no coverage under the policy and American Family has no duty to defend Purdy in the underlying action. We reverse the trial court's denial of summary judgment.

MILLER, Chief Justice, WUEST, HENDERSON, and AMUNDSON, Justices, concur.

#17507

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

APPEAL NO. 17507

AMERICAN FAMILY MUTUAL
INSURANCE COMPANY,

Plaintiff and Appellant,

vs.

BRADLEY ALAN PURDY, DAVID
LERBACK and JANI LERBACK, and
DAVID LERBACK as Guardian ad
Litem of CHRISTIAN LERBACK and
ANDREW LERBACK, Minors,

Defendants and Appellees.

APPEAL FROM THE CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT
PENNINGTON COUNTY, SOUTH DAKOTA

THE HONORABLE JEFF W. DAVIS
CIRCUIT COURT JUDGE PRESIDING

PETITION FOR REHEARING

NOTICE OF APPEAL FILED APRIL 18, 1991

PAGES 3-16

A rehearing of the cause heard on appeal to the South Dakota Supreme Court is necessary because the court has overlooked the constitutional violations inherent in the adoption of the judicially created law set forth in the court's opinion, and because the court has misapplied South Dakota law in the method with which it analyzed the cause on appeal. The constitutional violations and the misapplication of the law are discussed below.

CONSTITUTIONAL VIOLATIONS

C. Due Process.

1. State may not deprive citizens of property without due process.

The Bill of Rights of the United States Constitution guarantees that no person shall be deprived of property without due process of law. United States Constitution, amendment V. This protection

was made applicable to the states through the fourteenth amendment. United States Constitution, amendment XIV, section 1. In addition, the constitution of the State of South Dakota guarantees that no person shall be deprived of property without due process of law. South Dakota Constitution, article VI, section 2.

2. Those insured under policies of insurance have a property interest in insurance coverage.

An insured under the terms of an insurance policy which provides coverage for bodily injury has a legitimate claim of entitlement to insurance protection by virtue of the contract of insurance. A contractual provision can give rise to a claim of entitlement which may not be deprived without due process. Carlson v. Hudson, 277 N.W.2d 715, 718 (S.D. 1979). Therefore, insureds have a legitimate property interest in insurance protection.

See for example, Gray Panthers v. Schweiker, 652 F.2d 146, 148 n. 2 (D.C. Cir. 1981) (claimant's interest in receiving medical insurance benefits for which they had paid a monthly premium was a property interest); Fayle v. Stapley, 607 F.2d 858, 861 (9th Cir. 1979) (interest in disability insurance benefits represent substantial property interests to which due process protection must be afforded).

3. Court's opinion creates irrebuttable presumption.

The law created by the court's opinion in this case creates an irrebuttable presumption. The court judicially created a law which states that in every case involving criminal sexual contact, the perpetrator intends or expects to injure the victim. The inference is "as a matter of law." In other words, no factual evidence can rebut the presumption. Therefore, the presumption is

"irrebuttable." State Farm Fire & Casualty Company v. Abraio, 874 F.2d 619, 623 (9th Cir. 1989) (the presumption of intent to harm is irrebuttable).

4. The irrebuttable presumption operates to negate insurance coverage.

The irrebuttable presumption has the effect of eliminating insurance coverage. Typically, homeowner's insurance policies as well other types of insurance policies contain an exclusion which excludes any coverage for injury which is intended or expected by the insured. A judicially created law which holds in every case of criminal sexual contact that the insured intended or expected injury serves to automatically eliminate any insurance coverage for the acts of criminal sexual contact.

5. The irrebuttable presumption is not necessarily or universally true.

The irrebuttable presumption created by the court's opinion in this case is not necessarily or universally true. The court need look no further than the record of this case to find evidence that the inference that all criminal sexual offenders intend or expect harm is not necessarily or universally true. Dr. McCall-Perez, Ph.D., testified that in his opinion Purdy did not intend to injure Christian or Andrew Lerback and did not expect they would be injured.[6] (T pp. 14-29, see especially pp. 17-18) Moreover, American Family's own expert testified that if the mental evidence was available which he believed was necessary to determine Purdy's expectations or intentions at the

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[6]In fact, American Family has never claimed that Purdy did intend to injure the Lerback children. At oral argument before the South Dakota Supreme Court, American Family's counsel conceded that he believed Purdy had not intended to injure the Lerback children.

time of the criminal sexual abuse, that evidence could reveal that Purdy did not intend injury and did not expect that injury would occur. (T pp. 71-73)

Both Dr. McCall-Perez and Dr. McGrath (American Family's expert) hold Ph.D.'s in clinical psychology. Both experts are well informed with respect to the mental traits of pedophiles. The testimony of both experts reveals that the court's inference of an intended or expected injury is not necessarily or universally true. One expert testified positively that Purdy did not intend or expect injury; one expert testified that it was possible that Purdy did not intend or expect injury. Thus, the record before the court proves that the inference is not necessarily or universally true.

Not only is the record before the court devoid of evidence to support the inference

that criminal sexual offenders always intend or expect to injure their victims, so is the psychological literature. See for example D. Finkelhor, Child Sexual Abuse, (1984); Gebhard, Gagman, Palmeroy, et al, Sex Offenders, (Harper & Row 1965).

6. The irrebuttable presumption is unconstitutional.

Irrebuttable presumptions which are not necessarily or universally true, and which serve to deprive citizens of constitutionally guaranteed rights without due process of law are unconstitutional. Vlandis v. Kline, 412 U.S. 441, 93 S. Ct. 2230 (1973); Cleveland Board of Education v. LaFleur, 414 U.S. 632, 94 S. Ct. 791 (1974); Stanley v. Illinois, 405 U.S. 645, 92 S. Ct. 1208 (1972). Each of these cases are discussed in Lerbacks' Appellees' Brief at pp. 40-43. Briefly summarized, they stand for the proposition that before a citizen may be deprived of constitutionally

guaranteed rights, the citizen is entitled to a fair hearing to contest the proposed deprivation. A law which creates an irrebuttable presumption and thereby deprives the citizen of constitutionally guaranteed rights without the benefit of a hearing will not withstand constitutional analysis where the presumption is not necessarily or universally true. In other words, before a presumption can serve as a basis for depriving constitutional rights, the citizen must be given an opportunity to rebut the presumption if it is not necessarily or universally true.

The court's opinion in this case gives birth to a judicially-created law which raises an irrebuttable presumption that all perpetrators of criminal sexual contact intend or expect to injure their victims. While that certainly may be true in some cases, psychological evidence in general,

and the evidence before the trial court in this case in particular, demonstrates that it is not true in every case.

The irrebuttable presumption created by the court's opinion in this case is not necessarily or universally true. Therefore, the rule of law created by the court's opinion violates the Constitution of the United States and the South Dakota Constitution because it serves to deprive perpetrators of criminal sexual contact of a legitimate property interest - insurance coverage - without due process of law. To comply with constitutional mandates, perpetrators of criminal sexual contact must be provided a hearing on the issue of whether they intended or expected to injure their victim before they may be deprived of insurance coverage based on the intentional injury exclusion.

This argument was raised in Lerbacks' Appellees' Brief at pp. 37-45. Nevertheless, the court overlooked this argument as is evidenced by the failure of the court to even mention that the argument had been presented to the court.

Because the court's opinion gives birth to a judicially-created law creating an unconstitutional irrebuttable presumption which is not necessarily or universally true, a rehearing of the cause on appeal is necessary for the court to reconcile its opinion with the mandates of constitutional due process.

D. Equal Protection.

1. States may not deny equal protection of the laws to persons within their jurisdictions.

In addition to depriving policy holders of insurance coverage without due process of law, the court's opinion has the effect of denying equal protection of the laws to

a specific class of individuals - criminal sexual offenders.

The United States Constitution provides that no state shall deny to any person within its jurisdiction the equal protection of the laws. United States Constitution, amendment XIV, section 1. The same is true under the Constitution of South Dakota. South Dakota Constitution, article VI, section 18. Equal protection clauses of the United States and South Dakota Constitutions require that every person's rights be governed by the same rule of law under similar circumstances. Roden v. Solem, 411 N.W.2d 421 (S.D. 1987).

2. The court's opinion serves to deny equal protection of the laws to criminal sexual offenders.

The creation of an irrebuttable presumption that criminal sexual offenders invariably intend or expect to injure their victims establishes a rule of law which

treats individuals in similar circumstances differently. If the individual is involved in a criminal assault not involving sexual contact, the insured person is entitled to a hearing to determine whether that person intended or expected to injure the victim. Tri-State Insurance Company of Minnesota v. Bollinger, 476 N.W.2d 697 (S.D. 1991). Conversely, a perpetrator of assault and battery which involves sexual contact is not given the same protection under the law created by the court in this case. Since the law infers that criminal sexual offenders always intend or expect to injure their victims, there is no longer any purpose to be served by a hearing to determine the perpetrator's intentions or expectations. Sexual offenders do not get the protection the law provided to other perpetrators of assault and battery.

The court's opinion in this case establishes a rule of law which discriminates against sexual offenders purely on the basis of the nature of the act of physical assault. The court does so without the benefit of explaining why sexual offenders, unlike other types of offenders, are incapable of operating under a mental disease or defect which would preclude a finding that the individual intended or expected to injure the victim.

The law gives all criminal offenders the opportunity to negate the element of intent by proving such a mental impairment. SDCL 22-5-10. No legitimate basis exists in this case for departing from that rule solely on the basis of the sexual nature of the act involved. Sexual offenders, like all other persons, can be legally insane. Their subjective intentions and

expectations are just as much questions of fact as in any other case.

The court's error in establishing this "inference as a matter of law" is made even more egregious by the fact that the expert testimony contained in the record establishes that it is possible that some perpetrators of criminal sexual contact do not intend or expect injury. (T pp. 14-29, 71-73) American Family introduced no evidence to the contrary. Thus, there was no evidence in the record which would support the court's opinion.

Lerbacks alerted the court to the disparate treatment of perpetrators of sexual assault when compared to the treatment of perpetrators of other types of assault (for example, assault and battery). Lerbacks' Appellees' Brief at p. 45. Because the court's opinion deprives criminal sexual abusers of equal protection

of the laws by eliminating the necessity of a hearing to determine the perpetrator's intentions or expectations when such hearings are provided to other individuals, the court's opinion unconstitutionally denies equal protection of the laws to criminal sexual offenders. Therefore, rehearing of the cause on appeal is necessary for the court to reconcile its opinion with the constitutional mandate that all persons be provided equal protection of the laws.

C. Impairment of the Obligation of Contract

1. States may not create law impairing the obligation of contracts.

The Constitution of the United States and the South Dakota Constitution both prohibit the establishment of any law which impairs the obligation of contracts. United States Constitution, article I,

section 10, clause 1; South Dakota Constitution, article VI, section 12.

When considering whether judicial decisions which "make" law fall within the purview of these constitutional provisions, the courts have generally held in the negative. Central Land Company v. Laidley, 159 U.S. 103 (1895). See also N.O. Waterworks Co. v. La. Sugar Co., 125 U.S. 18 (1888); Hanford v. Davies, 163 U.S. 273 (1896); Ross v. Oregon, 227 U.S. 150 (1913); Detroit United Ry. v. Michigan, 242 U.S. 238 (1916); Long Sault Development Co. v. Call, 242 U.S. 272 (1916); McCoy v. Union Elevated R. Co., 247 U.S. 354 (1918); Columbia G. & E. Ry. v. South Carolina, 261 U.S. 236 (1923); Tidal Oil Co. v. Flannagan, 263 U.S. 444 (1924). See also The Constitution of the United States of America: Analysis and Interpretation, pp. 383-415 (U.S. Gov't Printing Office 1973)

(hereinafter referred to as "Constitutional Analysis and Interpretation"). However, in 1922, the Congress amended the judicial code to give the United States Supreme Court the power to review cases which alleged that a change in the rule of law by the highest court of a state was repugnant to the Constitution of the United States. Constitutional Analysis and Interpretation at p. 385.

The United States Supreme Court initially declined the power Congress had authorized and instead relied on the federal courts' power to determine state law. Tidal Oil Co. v. Flanagan, 263 U.S. 444, 450, 451-452 (1924). That reasoning, however, was severely eroded by a United States Supreme Court decision which reduced federal courts' abilities to decide cases based on their own notions of general principles of common law. Erie Railroad

Co. v. Tompkins, 304 U.S. 64 (1938). The Erie decision sufficiently undermines the United States Supreme Court's prior decisions as to raise the question whether the court will be forced to apply the obligations of contracts clause to judicial decisions as well as statutes and other legislative rules. Constitutional Analysis and Interpretation at p. 386.

There is no logical reason why the obligations of contracts clause should not apply to judicial decisions. When a state's highest court renders a decision, the state passes a law just as legally binding as if the state's legislature had enacted legislation. If the judicially created law impairs the obligations of contract, it offends constitutional principles every bit as much as offensive legislation. Constitutional Analysis and Interpretation at p. 385. A rule of law

contained in a decision of the state's highest court has as much legal effect as a statute or ordinance. The state's highest court, as an arm of state government, is certainly a "state actor" for constitutional purposes.

2. The plain language of the intentional injury exclusion does not automatically void coverage in criminal sexual contact cases.

The homeowners policy at issue in this case contains a provision which excludes coverage for injuries which are intended or expected by the insured (Index 61). The South Dakota Supreme Court has recognized that these intentional injury exclusions are not ambiguous. Klatt v. Continental Insurance Company, 409 N.W.2d 366, 370 (S.D. 1987). Where the language of the insurance policy is not ambiguous, the parties must abide thereby. Presentation Sisters, Inc. v. Mutual Benefit Life Insurance Company, 189 N.W.2d 452, 454

(S.D. 1971). The insurance provision is not ambiguous; therefore, both parties must abide by the language of the intentional injury exclusion; and the South Dakota Supreme Court may not create a law which impairs the obligations of contract.

3. The court's opinion enlarges the language of the intentional injury exclusion.

The plain language of the intentional injury exclusion limits the scope of the exclusion to injuries which are intended or expected by the insured. The language drafted by American Family contains no provisions specifically directed to excluding coverage for any injuries inflicted by the insured's criminal sexual conduct. Thus, the plain language of the intentional injury exclusion would exclude coverage in a criminal sexual contact case only if the insured intended or expected the injury. The effect of the court's

opinion is to enlarge the language of the intentional injury exclusion. In effect, the court has amended the exclusion to read as follows: "Not only is an injury which is expected or intended by the insured excluded from coverage, so also is every injury caused by the insured's criminal sexual contact regardless of the insured's actual subjective intentions or expectations." The practical effect of the court's ruling is to add an exclusion to the policy which did not originally exist under the policy's plain language.

4. The effect of the court's ruling is to impair obligations of contracts between insurers and insureds when insureds engage in criminal sexual contact without intending or expecting to injure their victims.

The plain language of the intentional injury exclusion would not exclude coverage (i.e. coverage would be provided) under circumstances where, although the insured engaged in criminal sexual contact, the

insured did not, as a matter of fact, subjectively intend or expect to injure the victim. The court's holding in this case impairs American Family's obligations under the contract because American Family is relieved of the obligation to indemnify Brad Purdy for the injuries suffered by the Lerbacks even though Purdy did not intend or expect to injure them, despite the fact that the plain language of the intentional injury exclusion requires American Family to provide such indemnification.

Insurers have the duty to define any limitations or exclusionary clauses in clear and explicit terms. Leuchtenmacher v. Farm Bureau Mutual Insurance Company, 461 N.W.2d 291, 294 (Iowa 1990). Failure to do so subjects the insurer to the risk that a court may adopt an alternative interpretation more favorable to the insured. Id. American Family did not

explicitly exclude coverage for injuries caused by the insured's criminal sexual contact. Therefore, unless the insured intended or expected injury, the intentional injury exclusion cannot provide a basis for excluding coverage in this case and American Family is contractually obligated to indemnify Brad Purdy for the injuries suffered by the Lerback children.

5. The court's opinion unconstitutionally impairs the obligations of contract.

The language of the homeowners policy drafted by American Family defined American Family's obligations to Brad Purdy and, consequently, to those injured by Brad Purdy's conduct. The plain language of the intentional injury exclusion would not relieve American Family of its duty to defend and indemnify Brad Purdy for sexually molesting the Lerback children unless Brad Purdy in fact subjectively

intended or expected to injure the Lerback children. The trial court, based upon evidence presented at the declaratory judgment trial, entered findings of fact holding that Brad Purdy did not intend or expect to injure the Lerback children. Therefore, under the plain language of the insurance contract, American Family was obligated to defend and indemnify Brad Purdy. The Supreme Court of the State of South Dakota created a rule of law which impairs American Family's contractual obligations toward Brad Purdy and, consequently, to those parties injured by Brad Purdy. The rule of law set forth in the court's opinion operates to engraft onto the homeowners policy drafted by American Family a provision which eliminates coverage which would otherwise have been afforded. Therefore, the court's opinion unconstitutionally impairs the

obligation contained in the homeowners insurance contract.

Because the court's opinion unconstitutionally impairs contractual obligations, a rehearing of the cause on appeal is necessary for the court to reconcile its opinions with the Constitution of the United States, article I, section 10, clause 1; and the South Dakota Constitution, article VI, section 12.

#17507

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

APPEAL NO. 17507

AMERICAN FAMILY MUTUAL
INSURANCE COMPANY,

Plaintiff and Appellant,

vs.

BRADLEY ALAN PURDY,

Defendant,

and

DAVID LERBACK and JANI LERBACK, and
DAVID LERBACK as Guardian ad
Litem of CHRISTIAN LERBACK and
ANDREW LERBACK, Minors,

Defendants and Appellees.

ORDER DENYING REHEARING

A Petition for rehearing in the above cause having been filed April 13, 1992, and no issue or question of law or fact appearing to have been overlooked or

misapprehended, and more than fifteen days having elapsed therefrom and no written statement having been filed with the Clerk of this Court by a majority of the justices thereof requesting a rehearing, now, therefore, in accordance with the Rehearing Procedure Rule of this Court, the petition for rehearing is denied.

Dated at Pierre, South Dakota, April 29, 1992.

BY THE COURT:

Robert A. Miller, Chief Justice

Filed April 29, 1992

Supreme Court, U.S.
FILED
AUG 27 1992
OFFICE OF THE CLERK

NO. 92 - 206

IN THE
SUPREME COURT OF THE UNITED STATES
OF AMERICA

OCTOBER TERM, 1991

AMERICAN FAMILY MUTUAL
INSURANCE COMPANY,

Respondent.

v.

BRADLEY ALAN PURDY, D.L. and J.L.,
and D.L. as Guardian ad Litem
of C.L. and A.L., Minors,

Petitioners.

Petition for Writ of Certiorari to
the Supreme Court of South Dakota

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Douglas M. Deibert
Counsel of record for
American Family Mutual
Insurance Company
Steven W. Sanford
CADWELL, SANFORD & DEIBERT
120 North Phillips Avenue
P.O. Box 1157
Sioux Falls, SD 57101
(605) 336-0828

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Due Process Clauses of the Fifth and Fourteenth Amendments of the United States Constitution are violated by a state supreme court decision applying an objective standard under state law to the question of whether a sexual molester expects or intends injury to his minor victims within the meaning of an exclusion in the molester's liability insurance policy.

2. Whether the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution is violated by a state supreme court decision applying an objective standard under state law to the question of whether a sexual molester expects or intends injury to his minor victims within the meaning of an exclusion in

the molester's liability insurance policy.

3. Whether the prohibition against impairment of contracts under Article 1, § 10, Cl. 1 of the United States Constitution is violated by a state supreme court decision adopting a rule of construction of a liability insurance contract.

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JURISDICTIONAL STATEMENT

Respondent accepts the jurisdictional statement of Petitioners.

CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE

Respondent agrees that Petitioners have accurately quoted and appropriately emphasized the constitutional provisions Petitioners rely upon.

STATEMENT OF THE CASE

Except as described below, Respondent accedes to Petitioners' Statement of the Case, including the Material Facts and Procedural History presented by the Petitioners. Petitioners do not present a federal question substantial enough to warrant this Court's review on Writ of Certiorari. The challenged decision of the South Dakota Supreme Court involved the interpretation of an exclusion in a liability insurance contract. The

United States Constitution should not be invoked to deprive state supreme courts of the right and duty to interpret disputed contracts between private parties.

The liability policy issued by American Family to the sexual molester ("Purdy") provided that coverage did not apply to injury "which is expected or intended by any insured. . . ." PET. APP. 67. The sexual molestation consisted of fondling of minor boys' genitals.[1] The victims received no physical injuries. Damages awarded in a separate suit were for mental and emotional injuries. This is not a case where a victim sustained an accidental physical injury in the course of the

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[1] Petitioners' Complaint against Purdy alleged that he "negligently and without intent to harm" fondled the young boys. RESP. APP. 67. This unusual allegation is more understandable as a means to manufacture insurance coverage than as common sense.

sexual contact (i.e. by falling down, attempting to escape, etc.).

In the trial of the declaratory judgment action Petitioners' expert testified that, in a subjective sense, Purdy did not expect or intend the harm for which damages were awarded against him. The expert had never interviewed or even met Purdy or his victims.[2] As is evident from its opinion, the South Dakota Supreme Court was persuaded by overwhelming contrary evidence from the deposition of Purdy, who was not present at the trial:

> Each of the four described incidents ended with Purdy asking A.L. if it felt good, to which A.L. responded "No."
>
> ....

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[2] The expert also conceded that his testimony was unprecedented in his own experience and had no support in professional or scientific literature. For more detail on the incredible nature of his testimony, see RESP. APP. 32-35.

He [Purdy, the perpetrator] stated that his prior victimization caused him considerable mental pain over the years including guilt, fear, shame and embarrassment. He could never bring himself to discuss this with his parents, despite what he considered a good relationship.

When initiating sexual contacts with the children, Purdy thought about his own experiences. Following each contact with the children, he told himself he wouldn't and shouldn't do it again. Purdy stated that he knew no good would result from these contacts with the children - even for himself or for them. In addition, as indicated above, Purdy closed and blocked the door and then held and sexually abused the children. He also bribed or threatened them not to tell their parents and, at the conclusion of one incident, inquired whether C.L. was okay.

. . . .

Therefore despite the testimony of Purdy and the Affidavit of Dr. McCall-Perez, it is clear that Purdy was aware of the harmful effects of such conduct.

American Family Insurance Co. v. Purdy, 483 N.W.2d 197, 200-201 (S.D. 1992); PET. APP. 91, 105-106 (emphasis supplied).

The South Dakota Supreme Court reversed the trial court's denial of American Family's Motion for Summary Judgment and, in interpreting the insurance policy, inferred "as a matter of law that harm was expected or intended" 483 N.W.2d at 201. The trial of the declaratory action was to the Court without a jury. Id. at 198. Because the South Dakota Supreme Court ruled that summary judgment should have been granted, the Court never reached the question of whether the trial court's findings and conclusions as a result of the trial were clearly erroneous and thus reversible.

SUMMARY OF ARGUMENT

Petitioners lack standing. To demonstrate standing, they must prove that it is likely, rather than speculative, that their injury will be cured by a favorable decision of this Court. The South Dakota Supreme Court held that the trial court erred in denying Respondent's Motion for Summary Judgment. However, the opinion also implies that on remand by this Court, the South Dakota Supreme Court would hold that the Purdy deposition testimony establishes beyond any reasonable dispute that Purdy expected harm to his victims and thus the trial court was clearly erroneous in finding for Petitioners. This result could be and would be reached without the need to establish any "irrebuttable presumption," and would render this Court's opinion merely advisory.

A Petition for Writ of Certiorari should not be granted unless it unambiguously appears that the state court decision to be reviewed lacks an adequate and independent ground in state law. The fact that the South Dakota Supreme Court specifically held that Purdy was aware of the harmful effects of his conduct does suggest the existence of an adequate and independent ground under state law. Certainly the South Dakota Supreme Court could review evidence and apply state law to it without offending the United States Constitution.

Because this case involves disputed claims under a liability insurance policy, and not fundamental interests, the South Dakota Supreme Court is free to adopt a prophylactic measure so long its inference of one fact from proof of another is not unreasonable and

arbitrary. Because there has been understandable state court skepticism about psychological evidence of the actual subjective intent of sexual molesters and because of the overwhelming evidence to the contrary described in the South Dakota Court's opinion, there is certainly a rational basis for the court's inferring as a matter of law a result that could be validly achieved by other means, such as legislative enactment or explicit policy exclusion.

For these same reasons, the South Dakota Supreme Court opinion also satisfies the more rigorous standard set forth in Vlandis v. Kline, 412 U.S. 441 (1973). There is substantial evidence by Purdy's own deposition testimony that he was "aware of the harmful effects of such conduct." 483 N.W.2d at 201, PET APP 106. Therefore, there was a more

than sufficient basis in fact to support the "irrebuttable presumption." The insurance contract interpretation rule under South Dakota law is an objective standard. Determination of actual subjective intent on a case-by-case basis is not a reasonable alternative to establishing an irrebuttable presumption that is grounded in an objective standard.

Petitioners' equal protection argument is based upon a comparison of two decisions of the South Dakota Supreme Court: The decision below which allegedly established an irrebuttable presumption of expectation that sexual molesters expect direct emotional harm to their victims; and another case in which the same court held that an assailant may not have intended or expected the broken ankle to result from a fist fight. The two cases are so

factually distinguishable that there is a rational basis for the South Dakota Supreme Court to afford differing treatment to the two cases.

Finally, Petitioners cannot challenge the South Dakota Supreme Court decision as an unconstitutional impairment of contract, because that clause of the Constitution applies only to legislative enactments and not judicial decisions.

ARGUMENTS OPPOSING ISSUANCE OF A WRIT OF CERTIORARI

I. Petitioners Lack Standing to Bring this Constitutional Challenge to the Decision of the South Dakota Supreme Court Because Petitioners Cannot Show that it is Likely that the "Injury" of this Court Will be Redressed by a Favorable Decision.

The concept of standing derives from the case-or-controversy requirement of Article III of the United States Constitution. Lujan v. Defenders of Wildlife, 504 U.S. _____, 112 S.Ct.

_____, 119 L.Ed.2d 351 (1992). Last term the Court in Lujan reiterated the three required elements of standing:

> First, the Plaintiff must have suffered an "injury in fact" . . . . Second, there must be a causal connection between the injury and the conduct complained of . . . . Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision"

504 U.S. at _____, 112 S.Ct. at ____, 119 L.Ed.2d at 364 (emphasis supplied). Here, Petitioners cannot satisfy the third required element.

A decision of this Court holding unconstitutional the "exception for criminal sexual contact cases as an impermissible 'irrebuttable presumption'" would not end the case. Presumably, there would be no offense to the United States Constitution if the South Dakota Supreme Court decided that in this case and as to Purdy only, the

trial court's findings were clearly erroneous. This argument was made by American Family on appeal (RESP. APP. 17-25, 29-44). The South Dakota Court never reached this issue because it disposed of the case by holding that the trial court erred in denying American Family's Motion for Summary Judgment.

If this Court were to grant the Petition and later rule for Petitioners, Respondent presumes that the case would then be remanded to the South Dakota Supreme Court for proceedings not inconsistent with this Court's opinion. Since the South Dakota Supreme Court did not reach the question of whether the trial court's trial findings were clearly erroneous, and since Respondent raised this issue on appeal to the South Dakota Supreme Court, Respondent would be free to request a rehearing on that issue and the South Dakota Supreme Court

would be free to decide against Petitioner accordingly. Cf. State v. Opperman, 247 N.W.2d 673, 674 (S.D. 1976).

There are substantial reasons to believe that such a result is likely, or conversely, that Petitioners cannot show that it is likely a favorable decision of this Court would avoid such a result.

Under South Dakota law, whether an insured expects injury (perhaps as opposed to intending it) is determined by an objective standard. Western Casualty & Surety Co. v. Waisanen, 653 F.Supp. 825 (D.S.D. 1987).[3] In that case an insured city was habitually late in paying its health insurance premiums. When the health insurer canceled for

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[3] Waisanen was cited with apparent approval by the South Dakota Supreme Court in Tri-State Insurance Co of Minnesota v. Bollinger, 476 N.W.2d 697, 701 (S.D. 1991).

nonpayment, a city employee was harmed because of medical and hospital bills that were not covered. As to a subsequent suit by the employee against the city, the liability insurer for the city denied coverage on the ground that the harm to the employee was "expected by the City." The Court phrased the coverage issue as follows:

> The question remaining for consideration is whether the cancellation of its health policies with Rural [the health insurer] was "expected" by the City.

Id. at 830. The Court then adopted the "substantial probability" test, i.e. injury or damages were expected if "the actor knew or should have known that there was a substantial probability that certain consequences would result from his actions." Id. at 831 (emphasis supplied). That same standard was

adopted by the Eighth Circuit Court of Appeals (under Minnesota law) in Auto-Owners Insurance Co. v. Jensen, 667 F.2d 714 (8th Cir. 1981):

> There may be instances when, although the insured was negligent in his actions, he knew or should have known that the resulting damage was expected. To mandate damages cannot be expected if the actor is negligent results in a meaning of the term expected that is too narrow.

Id. at 719 (emphasis supplied).

There is substantial reason to believe that, on remand, the South Dakota Supreme Court would hold (even in the absence of any presumption) that Purdy knew or should have known that there was a substantial probability that the victims would suffer direct harm by

his molestation.[4] In its published opinion, the South Dakota Supreme Court acknowledged American Family's argument that "if injury was not intended in the strict sense, at the very least, injury, adverse consequences, emotional stress or other harm is certainly expected by a child molester." 483 N.W.2d 200. The Supreme Court then discussed very substantial evidence from Purdy's own deposition testimony indicating that he should have known of the substantial probability of harm and certainly did

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[4] Under South Dakota law, even though the state Supreme Court perceives factual disputes preventing summary judgment, the Court can still reverse a trial court after a full trial, particularly where, as in this case, the trial court received the crucial testimony by deposition instead of from a live witness. See e.g., Groseth International, Inc. v. Tenneco, Inc., 410 N.W.2d 159, 172 (S.D. 1987), appeal after remand 440 N.W.2d 276, 279 (S.D. 1989). In this case the South Dakota Supreme Court reversed summary judgment on a defamation claim, perceiving disputed fact issues preventing summary judgment, but after a jury trial, held that based on the evidence actually offered at trial, the defamation issue should not have been submitted to the jury.

know. Id. at 200-201. In fact, the South Dakota Court specifically found that despite the expert testimony, "it is clear that Purdy was aware of the harmful effects of such conduct." Id. at 201.

The South Dakota Court then went on to observe that (i) deference on appeal to the trial court's findings need not be accorded because Purdy's testimony was by deposition, and (ii) in South Dakota a party cannot make out a better case than his own testimony permits. Id. at 201.[5]

In the past, the South Dakota Supreme Court has demonstrated a willingness to rely on grounds independent of the United States

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[5] Thus, if the "irrebuttable presumption" is overbroad or simply not true sometimes, Purdy stands in no position to complain. The presumption is completely accurate when applied to Purdy, as the South Dakota Court explicitly held.

Constitution to affirm its decision after this Court has reversed its decision on Federal Constitutional grounds. State v. Opperman, 247 N.W.2d 673 (S.D. 1976).

Under Lujan v. Defenders of Wildlife, supra, the Petitioner has no standing if he cannot prove it is "likely" as opposed to "speculative" that a decision of this Court will end the case with a result opposite of the summary judgment for Respondent. Since Petitioners have not met and cannot meet that burden, the Petition for Writ of Certiorari should be denied.

II. The Petition Should be Denied Because There Exists an Adequate and Independent Ground Under State Law for the Challenged Decision.

This Court should not review a judgment of a state court unless it affirmatively appears of record that the state court decision does not rest on an

adequate and independent ground in state law. South Dakota v. Neville, 459 U.S. 553, 560 (1983) (per Stevens, J. dissenting); Herb v. Pitcairn, 325 U.S. 117 (1945). In the past this Court has vacated a state court judgment and remanded for clarification of the basis of a decision in instances where there was an ambiguity as to the existence of independent adequate state law grounds. South Dakota v. Neville, 459 U.S. at 571 n.8 (Stevens, J., dissenting).

The South Dakota Supreme Court opinion disclosed two potentially adequate grounds under state law to support its decision:

> 1. The testimony of Petitioners' expert that Purdy did not expect harm to the minor victims from his sexual molestation "flies in the face of all reason, common sense,

and experience." American Family Insurance Co. v. Purdy, 483 N.W.2d 197, 199 (S.D. 1992) [Quoting with apparent approval CNA Insurance Co. v. McGinnis, 666 N.W.2d 689, 691 (Ark. 1984)].

2. The actual subjective intent claimed by Petitioners through their expert is directly contradicted by Purdy's own deposition testimony, which contradiction was reviewable without any deference to the state trial court. 483 N.W.2d at 201.

In other words, the South Dakota Supreme Court opinion could be read simply as the Court's judgment that the actual preponderance of evidence itself (rather than any irrebuttable presumption) required that Petitioners' claims of the

lack of subjective intent be rejected as a matter of law. This argument was raised, briefed and argued by Respondent. The South Dakota court specifically stated:

> Therefore, despite the testimony of Purdy and the Affidavit of Dr. McCall-Perez, it is clear that Purdy was aware of the harmful effects of such conduct.

483 N.W.2d at 201. PET. APP. 106. Even if the opinion is not crystal clear on this subject, it is clear, however, that the South Dakota Court found it necessary and appropriate to describe in detail the facts at trial contrary to Petitioners' arguments and to remind the parties that those facts were reviewable by the South Dakota Supreme Court without any required deference to the trial court. 483 N.W.2d at 200-201.

Review by this Court is purely discretionary. That discretion should

not be exercised when acceptance of review will likely bring only a remand to the South Dakota Supreme Court for clarification of the basis of its decision.

III. The Decision of the South Dakota Supreme Court Inferring as a Matter of Law that Harm was Expected or Intended by Perpetrators of Criminal Sexual Contact does not Create an Impermissible Irrebuttable Presumption.

A. The South Dakota Supreme Court merely adopted a constitutionally - permitted prophylactic measure for which a rational basis existed.

The end result of the South Dakota Supreme Court decision is the application to sexual contact cases of essentially the same objective standard for the "expected" policy exclusion as the District Court did in Western Casualty & Surety Co. v. Waisanen, supra. In other words, the South Dakota Court merely applied to a specific class of cases an objective standard that was

already one of general applicability in insurance coverage cases in South Dakota. The United States Constitution is not violated by use of this objective standard to judge whether an insured "expects" an injury to result from his conduct.

Petitioners omit reference to decisions of this Court which dictate the proper analysis. They are Mourning v. Family Publications Service, Inc., 411 U.S. 356 (1973); Weinberger v. Salfi, 422 U.S. 749 (1975); and Usery v. Turner Elk Horn Mining Co., 428 U.S. 1 (1976). Together, those cases stand for two propositions very important to this case:

1. The constitutional prohibition against irrebuttable presumptions does not prevent a state from adopting prophylactic

measures, i.e. applying a rule or legislation to a defined class of circumstances or persons. Mourning v. Family Publications Service, Inc., 411 U.S. at 377.

2. Whatever rigors inhere in the irrebuttable presumption analysis applicable to such fundamental liberties as residency, custody of children, marriage and family life do not apply where the stakes are economic only. Weinberger v. Salfi, 422 U.S. at 771-73; Usery v. Turner Elkhorn Mining Co., 428 U.S. at 23-24, 28. On economic issues, the standard is simply whether there is "some rational connection between the fact proved and

> the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate." Id. at 28 [quoting Mobile, J. & K. C.R. Co. v. Turnipseed, 219 U.S. 35, 43 (1910)].

The result achieved by the South Dakota Supreme Court decision could also be legitimately accomplished in many other ways:

1. The liability insurer could change the language of its policy to specifically adopt a substantial probability test for the "expected or intended" exclusion.

2. The liability insurer could change its policy to explicitly exclude harm by intentional sexual contact.

3. The South Dakota Legislature could decide on public policy grounds that sexual offenders should not have the benefit of insurance coverage for their criminal wrongs.

4. The South Dakota Supreme Court could decide that it was against the public policy of South Dakota to afford liability insurance coverage for the criminal wrongs of sexual offenders, as the Court has with certain claims for civil penalties. Ft. Pierre v. United Fire and Casualty, 463 N.W.2d 845, 848-49 (S.D. 1990).

Each of these actions would be a prophylactic measure that would not offend the United States Constitution. Furthermore, inferring an expectation of emotional harm from unwanted physical sexual contact with minors certainly satisfies the Turner Elkhorn standard of "rational connection." It is important

to note here that the applicable standard is "rational," not "perfect."

B. The South Dakota Supreme Court decision satisfies even the more rigorous standard required by Vlandis v. Kline.

i. Expectation by sexual offenders that their victims would suffer emotional harm from direct unwanted sexual contact has a sufficient basis in fact to support an irrebuttable presumption.

Some courts have considered claimed scientific evidence that sexual offenders do not actually intend or expect, in a subjective sense, harm to their victims. These courts have found repeatedly that such evidence is inherently incredible and flies in the face of common sense. See e.g., Landis v. Allstate Insurance Co., 546 S.2d 1051, 1053 (Fla. 1989); J.C. Penney Casualty Insurance Co. v. M.K., 804 P.2d 689 (Cal. 1991); CNA Insurance Co. v. McGinnis, 666 S.W.2d 689, 691 (Ark.

1984).

The South Dakota Supreme Court cited undisputed evidence from the record directly contrary to the so-called scientific evidence of Petitioners. The South Dakota Court explicitly found, despite the expert testimony, that Purdy was aware of the harmful effects of his conduct. In effect, Petitioners ask this Court to substitute its judgment, both as to empiricism and common sense, for the judgment of state courts and find that Petitioners' subjective intent evidence is sometimes true.

The issue is further complicated when one considers that there is an objective element to the "expected" test in South Dakota. Western Casualty & Surety Co. v. Waisanen, supra. The views of our South Dakota Supreme Court as to how the objective standard is

applied have not clearly crystallized. Compare Klatt v. Continental Insurance Co., 409 N.W.2d 366 (S.D. 1987); Tri-State Insurance Co. of Minnesota v. Bollinger, 476 N.W.2d 697 (S.D. 1991); and American Family Mutual Insurance Company v. Purdy, 483 N.W.2d 197 (S.D. 1992). To accept Petitioners' arguments on the irrebuttable presumption, this Court must presume that the generally applicable standard in South Dakota is a purely subjective one, requiring this Court to define a state law rule that has not yet been clearly enunciated by the court having right to the "last word" on that standard.

ii. There are no reasonable alternative means available to make the required determination allegedly eliminated by the irrebuttable presumption.

Petitioners' argument on this issue begs the question. Petitioners assume

that the legal inference of expectation or intent is merely a convenient substitute for a case-by-case determination of actual subjective intent. Time and again, state courts have rejected expert evidence of subjective intent because such evidence is so incredible and overwhelmingly contrary to common sense. Ante at 27. It is even more illogical to argue that consideration of such rejected evidence on a case-by-case basis is a reasonable alternative to rejecting it. In other words, acceptance of what has been rejected is not a reasonable alternative to its rejection.

If the standard were otherwise, state and federal trial courts would be unduly limited in their ability to apply evidentiary rules to exclude evidence which as a genre fails to meet minimum standards of scientific reliability or

other rationale for admissibility. For instance, can state or federal courts legitimately exclude evidence of polygraph results, or instead does the Due Process Clause require that each individual result be submitted to a jury? Is it constitutionally permissible to exclude evidence of all subsequent remedial measures used to prove culpable conduct under § 407 of the Federal Rules of Evidence, or must a court analyze each situation to determine whether the rationale for the rule actually applies to those facts? Under Rule 606 of the Federal Rules of Evidence, a juror may not testify concerning the process by which a verdict was reached except as to the existence of "extraneous prejudicial information." The Advisory Committee rationale is that:

> The mental operations and emotional reactions of jurors arriving at a given result would, if allowed as a subject of inquiry, place every verdict at the mercy of jurors and invite tampering and harassment.

In a case where jury affidavits are particularly compelling, does the United States Constitution require that a judge disregard the rule because in a given instance there happens to be a "reasonable" alternative to a blanket exclusion?

These examples serve to further emphasize the essential flaw in Petitioners' argument on this issue. While it is possible to have a court or jury trial on the actual subjective intent of each insured sexual molester, this is not a reasonable alternative where actual subjective intent has been permissibly rejected in favor of a standard that includes an element of

objectivity. As this Court recently reaffirmed:

> It is no conceivable denial of constitutional right for a State to decline to declare facts unless some legal consequence hinges upon the requested declaration.

Michael H. v. Gerald D., 491 U.S. 110, 126 (1989).

Finally, where Purdy's own testimony so strongly establishes that he expected harm to his victims, and no reasonable minds could differ about the "expected" issue, it would not be a reasonable alternative to permit persons who are strangers to the contract between Purdy and American Family to show that his actual subjective intent was something different.

V. The "Irrebuttable Presumption" does not Violate the Equal Protection Clause of the Fourteenth Amendment.

Petitioners' argument centers on a comparison of two South Dakota Supreme

Court decisions: American Family Mutual Insurance Company v. Purdy, 483 N.W.2d 197 (S.D. 1992) and Tri-State Insurance Co. of Minnesota v. Bollinger, 476 N.W.2d 697 (S.D. 1991). Petitioners point to the fact that in Purdy, the South Dakota Supreme Court adopted an "expected or intended" rule as a matter of law, while in Bollinger, the same court permitted that issue to be decided by a jury. Bollinger involved a criminal assault rather than unwanted sexual contact.

This Court's interpretation of the Equal Protection Clause has for many years involved a two-tiered analysis, dependent on the nature of the right or interest to be protected. Burlington Northern Railroad Co. v. Ford, 504 U.S. ____, 112 S. Ct. ____, 119 L.Ed.2d 432 (1992). Where merely economic interests (as opposed to fundamental rights) are

involved, distinctions between classes of affected parties do not deny equal protection "unless they failed in rationally furthering legitimate state ends." Id. at ____, 119 L.Ed.2d at 438. "Rational distinctions may be made with less than mathematical precision." Id. at ___, 119 L.Ed.2d at 439 [quoting New Orleans v. Dukes, 427 U.S. 297, 303 (1976).]

Because Bollinger and Purdy, both supra, do not involve fundamental rights and do involve differing facts, the South Dakota Supreme Court's differing treatment of them comports with the Equal Protection Cause. In Bollinger, the victim suffered a broken ankle as an indirect result of a fist fight. 476 N.W.2d at 700. The South Dakota Supreme Court determined that, while it might be said that the perpetrator could have expected facial cuts, he might not have

reasonably foreseen a broken ankle. 476 N.W.2d at 700.

If in Purdy, one of the victims had fallen during or as the result of sexual contact and had broken an ankle or other part of his body, Purdy would then more closely resemble Bollinger. No such injury was present in Purdy, however. If it were, the two cases would be more alike and there is nothing in the record to suggest that the South Dakota Supreme Court would have then treated Purdy differently than Bollinger.

In other words there is nothing to suggest that the "irrebuttable presumption" rule adopted by the South Dakota Supreme Court in Purdy, would apply to indirect physical harm (such as a broken limb) as opposed to the more direct emotional and psychological injury (the expected results of sexual contacts with children) for which a

money judgment was recovered against Purdy. Accordingly, Petitioners cannot sustain their equal protection argument.

VI. The "irrebuttable presumption" of Purdy does not violate the prohibition against impairment of contracts.

Petitioners' argument is clearly without any merit. Article I, § 10, Cl. 1 of the United States Constitution provides that "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ." (emphasis supplied.) This clause is directed only to legislative action and does not apply to judicial decisions. Barrows v. Jackson, 346 U.S. 249, 260 (1953).

CONCLUSION

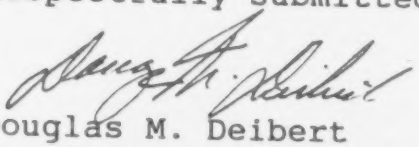
Petitioners search in vain for a federal constitutional provision requiring South Dakota courts to accept evidence which has been repeatedly characterized as inherently incredible

and defying common sense. Beyond that, this Court is asked to review a case that will require the Court to speculate about the actual intent of a state court in rendering its decision and to interpret state law rules of decision that are not yet clearly focused and established, all to the probable end that this Court's opinion will become advisory only or will require the Court to remand to the South Dakota Supreme Court for further clarification of the record.

Aside from the Petition's clear lack of constitutional merit, the extra burdens and ambiguities presented by this case suggest that it should not be among those relative few, from among thousands, that the Court accepts for decision. Accordingly, the Petition for

Writ of Certiorari should be in all respects denied.

Respectfully submitted.



Douglas M. Deibert
(Counsel of Record)
Steven W. Sanford
Cadwell, Sanford & Deibert
120 North Phillips Avenue
P.O. Box 1157
Sioux Falls, SD 57101
(605) 336-0828

Attorneys for Respondent
American Family Mutual
Insurance Company

Supreme Court, U.S.
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NO. 92 - 206

IN THE
SUPREME COURT OF THE UNITED STATES
OF AMERICA

OCTOBER TERM, 1991

AMERICAN FAMILY MUTUAL
INSURANCE COMPANY,

Respondent.

v.

BRADLEY ALAN PURDY, D.L. and J.L.,
and D.L. as Guardian ad Litem
of C.L. and A.L., Minors,

Petitioners.

Petition for Writ of Certiorari to
the Supreme Court of South Dakota

APPENDIX TO BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Douglas M. Deibert
Counsel of record for
American Family Mutual
Insurance Company
Steven W. Sanford
CADWELL, SANFORD & DEIBERT
120 North Phillips Avenue
P.O. Box 1157
Sioux Falls, SD 57101
(605) 336-0828

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL NO. 17507

AMERICAN FAMILY MUTUAL
INSURANCE COMPANY,

Plaintiff and Appellant,

vs.

BRADLEY ALAN PURDY, DAVID
LERBACK and JANI LERBACK, and
DAVID LERBACK as Guardian ad
Litem of CHRISTIAN LERBACK and
ANDREW LERBACK, Minors,

Defendants and Appellees.

APPEAL FROM THE CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT
PENNINGTON COUNTY, SOUTH DAKOTA

THE HONORABLE JEFF W. DAVIS
CIRCUIT COURT JUDGE PRESIDING

APPELLANT'S BRIEF

NOTICE OF APPEAL FILED APRIL 18, 1991

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The exact dates of the sexual contacts are not well defined. In Purdy's deposition testimony, he claimed that the contacts occurred in 1983 and 1985; the Lerbacks claim they occurred between 1982 and 1986. There is also a discrepancy in the number of such incidents. Plaintiffs initially claimed there had been more than 40 such incidents; at trial, Richard Lerback testified there were 10 to 15 contacts with Andrew, 5 or 6 with Christian. (T.9) These details are neither important nor necessary to the determination of this action, though.

During those periods of time, Bradley Purdy was attending college at Brigham Young University in Provo, Utah; and he also did a church ministry in Germany for a period of time. During those periods of time, he considered

himself to be a resident of his parents' household. Pursuant to the definition of an "insured" under the policy, there is no question Bradley Purdy meets the definition of an insured under the homeowner's policy of his parents. Consequently, that is not an issue in this appeal.

Bradley Purdy's birthdate is February 8, 1964. (Purdy P.53, L.1.) In the summer of 1982, which is when the Lerbacks claim the contacts first occurred, he was a recent high school graduate, 18 years old. The Lerbacks had moved to Rapid City in the spring of 1982. After helping the Lerbacks move in, the Purdy family became good friends of the Lerback family. Over the next few years, Bradley Purdy frequently watched the Lerback children. Up to the time the Lerback parents were told of the sexual contact, they thought highly

of Bradley Purdy, and even referred to him as their adopted son.

Andrew Lerback's birthdate is December 27, 1978. According to Andrew's trial testimony, Purdy had sexual contact with him approximately 15 times between 1982 and 1986. (Andrew P. 8, L. 15) The first act of sexual contact with Andrew involved Purdy's closing the door of a room, sitting with his back to the door with Andrew seated between Purdy's legs, during which time Purdy undid Andrew's pants and rubbed Andrew's penis for about 10 minutes. After this initial incident of sexual contact, Purdy asked Andrew if it felt good, to which Andrew replied "No." Immediately following this initial incident of sexual contact with Andrew, Purdy told Andrew he better not tell his parents. (Andrew P. 4)

Several weeks after the first

incident of sexual contact with Andrew, while in a car in the Safeway parking lot in Rapid City, South Dakota, Purdy undid Andrew's pants and again rubbed Andrew's penis for about 10 minutes. After this second incident of sexual contact in the Safeway parking lot, Purdy asked Andrew if it felt good, to which Andrew again replied "No." Immediately following this second incident of sexual contact with Andrew, Purdy asked Andrew if he was going to tell his parents, to which Andrew replied "No." (Andrew PP. 5-6)

On a later occasion, Purdy followed Andrew to Andrew's bedroom, Purdy shut the door, sat on the floor with his (Purdy's) back to the door, sat with his legs spread apart, and told Andrew to undo his (Andrew's) pants and sit between Purdy's legs again. On this third described incident of sexual

contact, Purdy rubbed Andrew's penis for about 10 minutes again. Immediately following this third described incident of sexual contact, Purdy asked Andrew if it felt good, to which Andrew replied "No it doesn't." (Andrew PP. 6-7)

On a fourth described incident of sexual contact with Andrew, Purdy took Andrew into Christian's room, closed the door, sat up against the door with his legs spread apart, and told Andrew to undo his (Andrew's) pants and sit between Purdy's legs again. On this fourth described incident of sexual contact, Purdy again rubbed Andrew's penis for about 10 minutes. After this fourth described incident of sexual contact, Purdy asked Andrew if it felt good, to which Andrew replied "No." Immediately following this fourth described incident of sexual contact, Purdy and Andrew heard Christian coming

downstairs to the room, and they also heard Mrs. Lerback pulling into the driveway. After hearing other members of the Lerback family arriving, Purdy grabbed the collar of Andrew's neck, pulled him back around and said "You better not tell your parents." (Andrew PP. 8-10)

During the times the sexual contacts with Andrew were going on, the acts occurred on approximately a weekly basis. (Andrew P. 8, L. 18) Purdy had other incidents of sexual contact with Andrew, totalling approximately 15, but details of these other contacts were not described by Andrew. (Andrew P. 8, L. 15)

Purdy had at least three incidents of sexual contact with Christian. On the first incident of sexual contact with Christian, Purdy took Christian to an upstairs bedroom and stood up on the

bed. Purdy then asked Christian if he trusted him (Purdy) to which Christian said yes. Purdy then told Christian to take down his pants, and that if Christian trusted Purdy, he would do it. Christian took down his pants, and Purdy rubbed Christian's penis for approximately five minutes. Following the first incident of sexual contact with Christian, after telling Christian he could put his pants back on, Purdy let Christian pick out a coin from Purdy's coin collection, as a reward for Christian's participation in the act. Following this first incident of sexual contact with Christian, Purdy told Christian "If you trust me, you won't tell your parents." (Christian P. 6)

On the second described incident of sexual contact with Christian, Purdy took Christian to a bedroom, laid Christian on the bed, told Christian to

take off his swimming shorts, and gave Christian a copy of Playboy Magazine. This second described incident of sexual contact took place during the summer of 1982, prior to Christian's ninth birthday. During the second described incident of sexual contact with Christian, Purdy masturbated Christian. Immediately following the second described incident of sexual contact with Christian, Purdy asked Christian if he was okay, to which Christian replied "Yes." (Christian PP. 7-8)

The third incident of sexual contact with Christian occurred during the summer of 1983. On this occasion, after some other boys had left, Purdy took Christian to a room, locked the door, stood Christian up on a chair, and told Christian to pull down his (Christian's) shorts. On this third incident of sexual contact with

Christian, Purdy began rubbing Christian's penis, and told Christian to go ahead and let it get hard. Christian responded "No" to Purdy's direction to "let it get hard." On this third described incident of sexual contact with Christian, Purdy then told Christian to "do it for me," to which Christian refused. (Christian P. 10)

Purdy was an intelligent young man. He graduated from high school in 1982 with honors, with approximately a 3.4 grade point average. (Purdy P. 55, L. 3-4) During his freshman year at Brigham Young University, Purdy had a grade point average in the 3.2 - 3.3 range. (Purdy P. 55, L. 12-13)

Purdy had been a victim of sexual contact himself, when he had been a young boy. (Purdy P. 37) Purdy's prior sexual victimization occurred when he was 10 to 11 years old, involved another

male approximately 16 years old, and involved 5 to 10 incidents over a four to five month period. (Purdy P. 55, L. 21 - P. 56. L. 7) Following his own victimization, the incidents had been on Purdy's mind a great deal. (Purdy P. 57, L. 5) His prior victimization caused him considerable mental pain over the years. (Purdy P. 57, L. 8) His prior victimization caused him guilt, and considerable fear, shame and embarrassment. (Purdy P. 38, L. 11; P. 57, L. 10; P. 60, L. 1; P. 59, L. 21; and P. 60, L. 3 and 5-7) While he considered himself fortunate to have come from a very good home, with very good parents, a home in which sexual matters could be discussed openly, he could never bring himself to tell his parents that he had been the victim of sexual abuse as a child. It was just too terrible a subject to discuss.

(Purdy PP. 55-61)

When initiating sexual contact with Andrew and Christian, Purdy had thought about his own prior victimization. (Purdy P. 61, L. 7) Following each act of sexual contact with the Lerback boys, Purdy thought about it. (Purdy P. 82, L. 7) Following each act of sexual contact with the Lerback boys, Purdy told himself he wouldn't do it again. (Purdy P. 82, L. 9) Following each act of sexual contact with the Lerback boys, Purdy told himself he shouldn't do it again. (Purdy P. 82, L. 11) Purdy recognized no good could result from the sexual contacts with the Lerback boys, either for himself or for the boys. (Purdy P. 82, L. 15)

During the time Purdy was engaging in sexual contact with the Lerback boys, he gave no thought to the fact that he might be an insured under his parents'

homeowner's insurance policy. (Purdy P. 53, L. 13, 18)

American Family twice brought Motions for Summary Judgment on the coverage question. The first Motion for Summary Judgment was served and filed October 19, 1988. After lengthy delays, the case was argued March 12, 1990. A Memorandum Opinion issued May 1, 1990, (Index 372, App. 6) followed by an Order Denying Summary Judgment entered on May 11, 1990.

Following additional discovery, American Family made a Motion to set aside the previous Order Denying Motion for Summary Judgment, or in the Alternative, Motion for Summary Judgment, on December 3, 1990. That second Motion was denied January 15, 1991.

Following a trial to the Court on January 25, 1991, the Trial Court

entered Findings of Fact and Conclusions of Law, and a final Judgment. The Judgment was entered and filed March 11, 1991. The Judgment found Bradley Purdy neither expected nor intended injury to result to the Lerback children, because of the sexual contacts, and as a result, American Family has a duty to defend and indemnify Purdy in the Lerback action.

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B. THE TRIAL COURT'S RELIANCE ON THE PSYCHOLOGICAL TESTIMONY, AND ITS RESULTING FINDINGS OF FACT AND CONCLUSIONS OF LAW, ARE CLEARLY ERRONEOUS.

The evidence produced by Plaintiffs in the form of testimony from Dr. Fred McCall-Perez is unworthy of belief. To borrow the characterization of the proffered psychiatric testimony in J.C. Penney v. M.K., supra (page 20 of this Brief, infra), his testimony was "inherently incredible." McCall-Perez was a $1,000.00 a day expert from Miami, Florida, who in January of 1990, 15 months after American Family's Motion for Summary Judgment was served and filed, executed an Affidavit (Index 272, App. 7) expressing an opinion that Purdy did not intend to cause harm, but rather acted out for purely sexual

gratification, and would convince himself the sexual contact was "a form of love and friendship." His trial testimony followed a similar vein.

Of course, such arguments have been rejected by other courts, and this Court should likewise repeat such a ridiculous conclusion. We should analyze the substance of McCall-Perez' testimony, though. He formed his opinions following review of a Minnesota Multiphasic Personality Inventory (MMPI) done on Purdy in August of 1989, more than three years after the last of the sexual contacts. He also reviewed other documents related to the criminal proceedings. He did not interview Purdy, either prior to executing the Affidavit submitted in opposition to the Motion for Summary Judgment, or prior to testifying at trial. McCall-Perez did not interview either Christian or Andrew

Lerback, either, not before execution of the Affidavit or before testifying at trial. McCall-Perez agreed this was the first time he had ever testified in litigation without interviewing either the victim and/or the perpetrator (T. P. 35, L. 14-18).

His Affidavit, of course, is couched solely in terms of intention, not expectation. At trial, McCall-Perez admitted expectation is not a term with which he is familiar. (T. P. 39, L. 1-16) He admitted an MMPI is not directed to expectation of harm in a sexual contact situation. (T. P. 29, L. 17-19) He admitted an MMPI has no correlation to motivation for sexual contact. (T. P. 32, L. 25 - T. P. 33, L. 7)

He admits there is no literature substantiating the idea that a perpetrator of sexual contact does not at least expect the consequences of his

acts. (T. P. 40, L. 24) Although he has testified in a number of sexual contact cases, always for the victim (T. P. 35, L. 9), he admits he has never before testified on this issue. (T. P. 47, L. 7-12) Despite his range of expertise and involvement, he has no opinion whether sexual contacts with children, such as that engaged in by Bradley Purdy, should be criminal offenses. (T. P. 41, L. 13) This despite the fact that in his opinion, at least 90% of children exposed to sexual contacts such as these do suffer adverse affects. (T. P. 41, L. 14-21; T. P. 43, L. 10-13)

In addition to never having testified on this issue before, he also admits he has never recommended to any legislative body that acts such as these should not be treated as criminal. (T. P. 47, L. 18-21) He is also unaware of

any recognized body within the psychiatric or psychological field that has made any recommendation to a legislative body, to de-criminalize such conduct. (T. P. 47, L. 22 - T. P. 48, L. 5)

Both McCall-Perez and the Trial Court seem to have equated the concept of intention with expectation. Once again, at the risk of too much repetition, we again state our position that the nature of these acts is such that an intention to cause injury should be inferred. Nonetheless, McCall-Perez' Affidavit and trial testimony clearly show he is talking about intention in the strict sense. He admits to equating expectation with intent. (T. P. 31, L. 9-13) On the intention issue, the Trial Court in its decision, twice limited its holding to the very narrow sphere of intention. (Court's Decision,

Separate Index, P. 7, L. 17; and P. 6, L. 13) At the very least, there must be an expectation of harm or injury from sexual contacts such as those perpetrated by Bradley Purdy.

American Family called Dr. Michael J. McGrath, a clinical psychologist from Sioux Falls. McGrath testified, candidly we believe, that there is no way to get inside someone's head, particularly to go back several years as McCall-Perez claims he did, to figure out one's expectation or intent. Nonetheless, McGrath took serious issue with McCall-Perez' testimony. First, he did not believe the MMPI, out of date as it was, was relevant to determine Bradley Purdy's state of mind several years prior when he was molesting the Lerback boys. (T. P. 63)

McGrath also believes there were factors that would lead to a conclusion

that Purdy did at least expect injury or adverse consequences. First was Purdy's own prior victimization. Second, Purdy's intelligence was a factor dictating in favor of expectation. Third is the number of acts involved. Finally, protest of one of the boys is yet another factor. T. P. 66-67).

Interestingly, although McCall-Perez generally agreed that an expression of concern, phrased exactly as Purdy did to one of the boys: "Are you okay," was evidence of some expectation of harm, McCall-Perez initially did not recall that testimony. (T. P. 51, L. 25) Once that was pointed out to him, he still testified he found nothing in Purdy's testimony that led him to conclude Purdy might have expected harm to be resulting. (T. P. 49, L. 5; T. P. 52, L. 10) McCall-Perez' testimony is, quite simply

stated, unworthy of belief. Should this Court not decide this issue as a matter of law, as 24 of 25 current jurisdictions have, this Court should view the real objective facts here, and determine at the very least, that Bradley Purdy had an expectation of injury from his acts of sexual contact with the Lerback boys.

The Findings of Fact and Conclusions of Law proposed by American Family were rejected in their entirety by the Trial Court, despite the fact that we rather painstakingly set forth the very precise facts relating to the sexual contacts as testified to by Christian and Andrew. We included with the Findings of Fact and Conclusions of Law an Index showing the specific pages and line numbers of Purdy's deposition testimony, and Christian and Andrew's trial testimony. Those Findings of Fact and Conclusions

of Law as proposed by American Family should have been entered, and based thereon, at least an expection of injury should have been found. Relying as they do on McCall-Perez' "inherently incredible" testimony, they are clearly erroneous.

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL NO 17507

AMERICAN FAMILY MUTUAL
INSURANCE COMPANY,

Plaintiff and Appellant,

vs.

BRADLEY ALAN PURDY, DAVID
LERBACK and JANI LERBACK, and
DAVID LERBACK as Guardian ad
Litem of CHRISTIAN LERBACK and
ANDREW LERBACK, Minors,

Defendants and Appellees.

APPEAL FROM THE CIRCUIT COURT
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PENNINGTON COUNTY, SOUTH DAKOTA

THE HONORABLE JEFF W. DAVIS
CIRCUIT COURT JUDGE PRESIDING

APPELLANT'S REPLY BRIEF

NOTICE OF APPEAL FILED APRIL 18, 1991

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II. The Trial Court's Findings of Fact and Conclusions of Law are clearly erroneous.

A. The Findings and Conclusions are unsupported by the evidence.

The Court entered 11 Findings of Fact (Index 508; Appendix 2). American Family proposed 66 Findings of Fact (Index 491; Appendix 3), along with an Index to proposed Findings of Fact (Index 500; Appendix 4). The Index referred to specific pages and lines of trial testimony of the Lerback boys, Plaintiff's expert, and Bradley Purdy. Particularly with reference to details of the sexual contacts with the boys, American Family's proposed Findings and the Index thereto detail the true objective facts surrounding the acts of sexual contact. Nonetheless, the Trial Court rejected those proposed Findings, and adopted only the conclusory Findings

proposed by the Lerbacks. Those Findings are clearly erroneous, and the rejection of American Family's proposed Findings is likewise clearly erroneous, as they are based on either uncontradicted evidence, or on the evidence submitted by the Lerbacks or by Purdy.

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C. The testimony of Dr. Fred McCall-Perez, Lerbacks' expert, is unworthy of belief.

In the Lerbacks' Brief, McCall-Perez is painted as the only person who can see the real truth here, and that real truth is that Bradley Purdy did not expect adverse consequences to result to the Lerback boys, from these repeated acts of sexual molestation. Their Brief argues that the other 24 courts have been blinded by these "fictions;" these other 24 jurisdictions have indulged in an "ignorance approach" (Appellee's Brief, P. 29); and in employing these fictions and their ignorance, these courts "bend over backwards to find a method to defeat coverage," (Appellee's Brief, P. 32-33). Apparently only McCall-Perez can see that the Emperor in this parade is really wearing no

clothes. That testimony is unworthy of belief.

From the outset, it is difficult to believe that McCall-Perez, who resides in and whose professional practice is in Miami, Florida, is the only mental health professional within 2,000 miles who can really see the light. His opinion was initially put before the Trial Court in a short Affidavit, talking only of intention. By the time of trial, that had come around to include expectation. At the risk of repetition, the following are other highlights of his testimony.

He is not familiar with the term "expectation." (T., P. 39, L. 1-16) He admitted an MMPI, one of the documents he used, is not directed to expectation of harm in a sexual contact situation. (T., P. 29, L. 17-19) He admitted an MMPI has no correlation to motivation

for sexual contact. (T., P. 32, L. 25 - P. 33, L.7) The MMPI was, of course, rather outdated, in that it was administered three to four years after the last sexual contact with the boys. (T., P. 33, L. 16) He admits there is no literature substantiating the idea that a perpetrator of sexual contact does not at least expect the consequences of his acts. (T., P. 40, L. 24) Although he has testified in a number of sexual contact cases, always for the victim (T. P. 35, L. 9), he admits he has never before testified on this issue. (T. P. 47, L. 7-12) In his experience as an expert witness, this was also the first time he had ever testified without interviewing either the victim and/or the perpetrator. (T., P. 35, L. 18) Despite his range of expertise and involvement, he has no opinion whether sexual contacts with

children, such as that engaged in by Bradley Purdy, should be criminal offenses. (T. P. 41, L. 13) This despite the fact that in his opinion, at least 90% of children exposed to sexual contacts such as these do suffer adverse affects. (T. P. 41, L. 14-21; T. P. 43, L. 10-13)

In addition to never having testified on this issue before, he admits he has never recommended to any legislative body that acts such as these should not be treated as criminal. (T. P. 47, L. 18-21) He is also unaware of any recognized body within the psychiatric or psychological field that has made any recommendation to a legislative body, to de-criminalize such conduct. (T. P. 47, L. 22 - T. P. 48, L. 5)

Then although he generally agreed that an expression of concern, phrased

exactly as Purdy did to one of the boys: "Are you okay," was evidence of some expectation of harm, (T. P. 51, L. 25) once it was pointed out to him that one of the boys specifically testified to such a fact, McCall-Perez still testified he found nothing that would lead him to conclude Purdy might have expected harm to be occurring. That testimony is unworthy of belief.

In the context of discussing McCall-Perez' opinions, and why he is the more credible expert, the Lerbacks argue that Dr. Michael McGrath, the expert called by American Family, actually makes their case. That simply isn't true. McGrath testified, more truthfully we believe, that he simply "could not get into someone's head," on the basis of review of an outdated MMPI, and other documents, to determine what someone was thinking four or five years

ago. He nonetheless pointed to several objective facts, which make all the sense in the world, that pointed to the conclusion that Purdy did expect the consequences of his acts. Those four facts are detailed at page 27 of our initial Brief, and are quickly repeated here, without further comment:

1) Purdy's own prior victimization;

2) His intelligence;

3) The number of sexual contacts with the Lerback boys; and

4) Protest of one of the boys.

Recently within our profession, there has developed increasing criticism of what has been referred to as "junk science," and "junk expert testimony." That criticism is directed at the idea that an expert can be found to advance any proposition whatsoever. Perhaps such criticism is too harsh in the

context of Dr. McCall-Perez' testimony. He does have legitimate credentials, and has given testimony a number of times on behalf of victims, albeit not on this issue. Perhaps his testimony does not fall within the realm of the "junk science" and "junk expert testimony" that is the subject of recent criticism. Nonetheless, the fact remains his testimony is unworthy of belief on the intent or expectation issue. As other courts have rejected such psychiatric testimony, so should this Court reject McCall-Perez' testimony.

Several cases have specifically rejected psychiatric testimony, such as that of McCall-Perez. In CNA Insurance Company v. McGinnis, 666 S.W.2d 689 (Ark. 1984), the Arkansas Supreme Court summarily rejected testimony by a clinical psychologist, who testified a perpetrator of sexual contact did not

intend any harm to his victims. In Rodriquez v. Williams, 729 P.2d 627 (Wash. 1986), the Washington Supreme Court likewise refused to consider the psychologist's Affidavit on the intent issue. In that case, the Trial Court ordered it stricken from the record, on the ground that it was conclusory and inadmissible. Finally, the most recently reported case to discuss this issue, J.C. Penney Casualty Insurance Company v. M.K., 804 P.2d 689 (Cal. 1991), also rejected psychiatric testimony, 804 P.2d at 700. The Court there stated "We note, however, that testimony, psychiatric or otherwise, that no harm was intended flies 'in the face of all reason, common sense, and experience.'" (Citations omitted.) This discussion was in the context of a discussion on intentional harm, not even the expectation issue. The California

Supreme Court apparently quotes with approval an earlier California case "characterizing such psychiatric testimony as 'inherently incredible,'" Id.

This Court should likewise dismiss the psychological testimony of McCall-Perez as "inherently incredible." It is difficult to understand how McCall-Perez can testify as he did, based only on a review of documents, one of which, an outdated MMPI, he admits is not even directed to issues involved in expectation or intent. The other documents he reviewed had even less to do with mental issues. Then in the face of Purdy's own testimony, along with the graphic detail of these repeated acts of sexual contact, it certainly flies in the face of all reason, to use the same phrase from another Court, to believe such injury was not at least expected.

South Dakota Pattern Jury Instruction 2.12 addresses the idea that even though one might be qualified as an expert, the finder of fact need not accept the testimony. That Instruction ends with the sentence "If you should conclude the reasons given in support of the opinion are not sound, or that the opinion is outweighed by other evidence, you may disregard the opinion entirely." Here the reasons in support of McCall-Perez' opinions are not sound. His testimony should be rejected and disbelieved.

D. The common sense approach should not be rejected.

Appellees' Brief criticizes the "so-called 'common sense' arguments." (Appellees' Brief, P. 28-31) We will not devote a great deal of time or print to the issue. We continue to believe the other 24 jurisdictions have adopted

a reasonable, objective, common-sense approach and conclusion, in finding the injurious consequences of such acts are expected or intended by the perpetrator. As we frequently argue to juries, their common sense need not be left outside the jury room. Here that common sense approach should be applied, in the context of what is reasonable to expect from repeated acts of sexual molestation on young children.

In this regard, several other arguments should be addressed. In summarizing Bradley Purdy's testimony, Appellees' Brief at page 5 states "Purdy testified that the motivation that compelled him to fondle the Lerback children was his own overriding need to try to understand his own sexual molestation." It is difficult to comprehend how a deeper understanding could be gained, by repeatedly molesting

little boys. The next stated idea, that is that he "gave no thought to the consequences that could result" also seems to fly in the face of common sense, to again borrow that phrase from several of the decisions. Again referring to our detailed proposed Findings of Fact which were rejected by the Trial Court, but nonetheless which used word-for-word testimony from the Lerback boys, it is difficult to believe Purdy gave no thoughts to anything, in light of his telling the boys they had better not tell their parents, and other such threats, one of which was made after grabbing one of the boys by the back of his neck.

Sexual molestation of children is difficult to understand. We would probably concede that there is some degree of compulsive-impulsive conduct involved. Similar compulsive-impulsive

behavior probably exists in just about all criminal acts, particularly sexual acts. Taking the Lerbacks' arguments to their logical conclusion, should forcible rape be covered by a homeowner's policy? The obvious response to that argument is "Oh, that is much worse than this." But is it? Are the adverse consequences any less likely to occur. The answer is clearly no. Consequently, this argument on the compulsive-impulsive nature of the acts must fail.

The Lerbacks essentially argue that Purdy had no thoughts. (Appellee's Brief, P. 16-17) Common sense dictates otherwise. Purdy himself testified otherwise. Following each act of sexual contact with the Lerback boys, Purdy thought about it. (Purdy deposition, P. 82, L. 7) Following each act of sexual contact with the boys, Purdy told

himself he wouldn't do it again. (Purdy, P. 82, L. 9) Following each act of sexual contact with the boys, Purdy told himself he shouldn't do it again. (Purdy, P. 82, L. 11) Purdy recognized no good could result from the sexual contacts with the Lerback boys, either for himself or for the boys. (Purdy, P. 82, L. 15)

Furthermore, the assertion is likewise inconsistent with our proposed Findings 16-41, which need not be set forth in detail again. Again, the graphic testimony of the Lerback boys in describing the acts tells far more than the "Gee, I just didn't think" argument, which Appellees' Brief now urges.

APPENDIX 3

STATE OF SOUTH DAKOTA
COUNTY OF PENNINGTON

IN CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT

File No. 88-1209

FINDINGS OF FACT AND CONCLUSIONS OF LAW

****

AMERICAN FAMILY MUTUAL
INSURANCE COMPANY,

Plaintiff,

vs.

BRADLEY ALAN PURDY; DAVID
LERBACK and JANI LERBACK,
and DAVID LERBACK as Guardian
ad Litem of CHRISTIAN LERBACK
and ANDREW LERBACK, Minors,

Defendants.

****

This action having come on for trial before the Court sitting without a jury at the Pennington County Courthouse, Rapid City, South Dakota, at 9:00 o'clock a.m. on January 25, 1991; and

Plaintiff having appeared by its counsel Douglas M. Deibert of Cadwell, Sanford & Deibert, Sioux Falls, South Dakota; Defendant Bradley Purdy having appeared by his attorney, Rodney Schlauger of Bangs, McCullen, Butler, Foye & Simmons, of Rapid City, South Dakota; and Defendants David Lerback and Jani Lerback having appeared by their counsel, Donald P. Knudsen of Gunderson, Palmer, Goodsell & Nelson, of Rapid City, South Dakota; and

The Court having heard the testimony of the witnesses, and having considered the testimony, exhibits and other evidence offered at trial, including the trial testimony of Christian Lerback and Andrew Lerback given in related proceedings, and the deposition testimony of Bradley Purdy, and having considered the arguments of counsel, and being in all things

advised,

The Court now makes the following:

FINDINGS OF FACT

1. At all times material between 1982 and 1986, Bradley A. Purdy (hereinafter Purdy) resided with his parents, Richard and Carolyn Purdy, in Rapid City, South Dakota.

2. Purdy's birth date is February 8, 1964.

3. Between 1982 and 1986, Richard and Carolyn Purdy carried homeowner's liability insurance coverage with Plaintiff American Family Mutual Insurance Company, according to the terms and conditions of the policy forms that comprise Trial Exhibits 1 and 2.

4. Said policies excluded from liability coverage damages or injuries relating from acts of an insured that were expected or intended by any

insured.

5. Purdy was an insured under the policies in effect from 1982 to 1986.

6. At all times material between 1982 and 1986, the Purdy family members were friends of the David and Jani Lerback family.

7. On numerous occasions between 1982 and 1986, Purdy was in the company of the Lerback children, Christian Lerback (hereinafter Christian), whose birth date is September 21, 1972; and Andrew Lerback (hereinafter Andrew), whose birth date is December 27, 1978.

8. Purdy would on occasion babysit Andrew and Christian, and either in the babysitting context or other situations, was on numerous occasions with the Lerback children in the absence of the Lerback parents.

9. On approximately 15 occasions between 1982 and 1986, Purdy had sexual

contact with Andrew.

10. The first act of sexual contact with Andrew involved Purdy's closing the door of a room, sitting with his back to the door, with Andrew seated between Purdy's legs, during which time Purdy undid Andrew's pants and rubbed Andrew's penis for about 10 minutes.

11. Immediately following this initial incident of sexual contact, Purdy asked Andrew if it felt good, to which Andrew replied "No."

12. Immediately following this initial incident of sexual contact with Andrew, Purdy told Andrew he had better not tell his parents.

13. Several weeks after the first incident of sexual contact with Andrew, while in a car in the Safeway parking lot in Rapid City, South Dakota, Purdy undid Andrew's pants and again rubbed Andrew's penis for about 10 minutes.

14. Immediately following the second incident of sexual contact in the Safeway parking lot, Purdy asked Andrew if it felt good, to which Andrew again replied "No."

15. Immediately following this second incident of sexual contact with Andrew, Purdy asked Andrew if he was going to tell his parents, to which Andrew replied "No."

16. On a later occasion, Purdy followed Andrew to Andrew's bedroom, Purdy shut the door, sat on the floor with his (Purdy's) back to the door, sat with his legs spread apart, and told Andrew to undo his (Andrew's) pants and sit between Purdy's legs again.

17. On this third described incident of sexual contact, Purdy rubbed Andrew's penis for about 10 minutes again.

18. Immediately following this

third described incident of sexual contact, Purdy asked Andrew if it felt good, to which Andrew replied "No, it doesn't."

19. During the times the sexual contact with Andrew was going on, the acts occurred on approximately a weekly basis.

20. On a fourth described incident of sexual contact with Andrew, Purdy took Andrew into Christian's room, closed the door, sat up against the door with his legs spread apart, and told Andrew to undo his (Andrew's) pants and sit between Purdy's legs again.

21. On this fourth described incident of sexual contact, Purdy again rubbed Andrew's penis for about 10 minutes.

22. Immediately following this fourth described incident of sexual contact, Purdy asked Andrew if it felt

good, to which Andrew replied "No."

23. Immediately following this fourth described incident of sexual contact, Purdy and Andrew heard Christian coming downstairs to the room, and they also heard Mrs. Lerback pulling into the driveway.

24. Immediately following this fourth described incident of sexual contact with Andrew, and after hearing other members of the Lerback family arriving, Purdy grabbed the collar of Andrew's neck, pulled him back around, and said "You better not tell your parents."

25. Purdy had other incidents of sexual contact with Andrew, totalling approximately 15, but details of these other contacts were not described by Andrew.

26. Purdy had at least three incidents of sexual contact with

Christian.

27. On the first incident of sexual contact with Christian, Purdy took Christian to an upstairs bedroom and stood up on the bed.

28. Purdy then asked Christian if he trusted him (Purdy), to which Christian said yes.

29. Purdy then told Christian to take down his pants, and that if Christian trusted Purdy, he would do it.

30. Christian took down his pants, and Purdy rubbed Christian's penis for approximately five minutes.

31. Following the first incident of sexual contact with Christian, after telling Christian he could put his pants back on, Purdy let Christian pick out a coin from Purdy's coin collection, as a reward for Christian's participation in the act.

32. Following the first incident of sexual contact with Christian, Purdy told Christian "If you trust me, you won't tell your parents."

33. On the second described incident of sexual contact with Christian, Purdy took Christian to a bedroom, laid Christian on the bed, told Christian to take off his swimming shorts, and gave Christian a copy of Playboy Magazine.

34. This second described incident of sexual contact took place during the summer of 1982, prior to Christian's 9th birthday. 35. During the second described incident of sexual contact with Christian, Purdy masturbated Christian.

36. Immediately following this second described incident of sexual contact with Christian during the summer of 1982, Purdy asked Christian if he was

okay, to which Christian replied "Yes."

37. The third incident of sexual contact with Christian, occurred during the summer of 1983.

38. On the third described incident of sexual contact with Christian, after some other boys had left, Purdy took Christian to a room, locked the door, stood Christian up on a chair, and told Christian to pull down his (Christian's) shorts.

39. On this third incident of sexual contact with Christian, Purdy began rubbing Christian's penis, and told Christian to go ahead and let it get hard.

40. Christian responded "No" to Purdy's direction to "Let it get hard."

41. On this third described incident of sexual contact with Christian, Purdy then told Christian "Do it for me," to which Christian refused.

42. Both Christian and Andrew described feelings of fear and confusion over the sexual contacts initiated by Purdy.

43. David Lerback and Jani Lerback have instituted a civil action against Bradley Purdy, seeking damages in their own right and on behalf of their minor children Christian and Andrew, in which they allege entitlement to damages against Purdy which have allegedly resulted from the sexual contacts with Christian and Andrew. Said case is filed with the Pennington County Clerk of Courts as Case No. 88-903.

44. Purdy had been a victim of sexual contact himself, when he had been a young boy.

45. Purdy grew up in a home with good parents, with whom he could openly discuss sexual matters.

46. Because of the shame, guilt,

fear and embarrassment caused by his own victimization, Purdy was never able to discuss with his parents his own prior victimization, until after his arrest for the acts of sexual contact with the Lerback boys.

47. Purdy was charged criminally for acts of sexual contact with the Lerback boys, for which he was convicted and sentenced.

48. The acts of sexual contact with Andrew and Christian occurred following Purdy's graduation from high school.

49. Purdy graduated from high school in 1982 with honors, with approximately a 3.4 grade point average.

50. According to Purdy, the acts of sexual contact with the Lerback boys occurred following his first year of college at Brigham Young University.

51. During his freshman year at

Brigham Young University, Purdy had a grade point average in the 3.2 - 3.3 range.

52. Purdy's prior sexual victimization occurred when he was 10 to 11 years old, involved another male approximately 16 years old, and involved 5 to 10 incidents over a four to five month period.

53. Following his own victimization, the incidents had been on Purdy's mind a great deal.

54. Purdy's prior victimization caused him considerable mental pain over the years.

55. Purdy's prior victimization caused him guilt.

56. Purdy's prior victimization caused him considerable fear over the years.

57. Purdy's prior victimization caused him shame and embarrassment.

58. When initiating sexual contact with Andrew and Christian, Purdy had thought about his own prior victimization.

59. Following each incident of sexual contact with the Lerback boys, Purdy thought about it.

60. Following each act of sexual contact with the Lerback boys, Purdy told himself he wouldn't do it again.

61. Following each act of sexual contact with the Lerback boys, Purdy told himself he shouldn't do it again.

62. Purdy recognized no good could result from the sexual contacts with the Lerback boys, either for himself or for the boys.

63. During the time Purdy was engaging in sexual contacts with the Lerback boys, he gave no thought to the fact that he might be an insured under his parents' homeowner's policy.

64. In at least 90% of the cases, adverse or injurious consequences will result to the child victim of sexual contacts.

65. Based on the nature of sexual contact involved, there is an inference of intent to injure.

66. Bradley Purdy expected or intended injury or adverse consequences to result to Christian and Andrew Lerback, as the result of his sexual contacts with them.

Upon the foregoing Findings of Fact, the Court now makes the following

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the parties and the subject matter of this action.

2. An intent to injure, or expectation of harm or injury will be inferred from the nature of the acts of sexual contact initiated by Bradley

Purdy upon Andrew and Christian Lerback.

3. Bradley Purdy expected injury or adverse consequences to result to Andrew and Christian Lerback, as the result of Purdy's sexual contacts with the boys.

4. The exclusionary language of the applicable insurance policies upon which Bradley Purdy is an insured precludes coverage for any damages or injuries inflicted by Bradley Purdy upon Andrew and Christian Lerback, as the result of the acts of sexual contact.

5. Plaintiff American Family Mutual Insurance Company is not obligated to defend Bradley Purdy in the action brought by the Lerbacks against Bradley Purdy, nor is Plaintiff American Family Mutual Insurance Company obligated to indemnify Bradley A. Purdy for any amounts that may be adjudged against Bradley Purdy in said legal

action.

Dated this _____ day of February, 1991.

BY THE COURT:

JEFF W. DAVIS
Circuit Court Judge

ATTEST:

_____
Clerk of Courts

By _____
Deputy

(SEAL)

APPENDIX 4

STATE OF SOUTH DAKOTA
COUNTY OF PENNINGTON

IN CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT

File No. 88-1209

INDEX TO
PROPOSED FINDINGS OF FACT

****

AMERICAN FAMILY MUTUAL
INSURANCE COMPANY,

Plaintiff,

vs.

BRADLEY ALAN PURDY; DAVID
LERBACK and JANI LERBACK,
and DAVID LERBACK as Guardian
ad Litem of CHRISTIAN LERBACK
and ANDREW LERBACK, Minors,

Defendants.

****

For the convenience of the Court and counsel, the following references to various transcripts are made, matching proposed Findings of Fact with previously given testimony.

FINDING	REFERENCE
2	Bradley Purdy deposition, p.53
9	Andrew Lerback Trial Transcript, Page 8, Line 15
10-12	Andrew Lerback Trial Transcript, Page 4
13-15	Andrew Lerback Trial Transcript, pages 5-6
16-18	Andrew Lerback Trial Transcript, pages 6-7
19	Andrew Lerback Trial Transcript, Page 8, Line 18
20-24	Andrew Lerback Trial Transcript, Page 8-10
25	Andrew Lerback Trial Transcript, Page 8, Line 15
26	Christian Lerback Trial Testimony, Pages 6-10
27-32	Christian Lerback Trial Testimony, Page 6
33-36	Christian Lerback Trial Testimony, Pages 7-8
37-41	Christian Lerback Trial Testimony, Page 10
44	Purdy Deposition, Page 37
45	Purdy Deposition, Page 60
46	Purdy Deposition, Page 60, Line 23; Page 61, Line 7
47	Purdy Deposition, Page 48

48	Purdy Deposition, Page 54, Line 22
49	Purdy Deposition, Page 55, Lines 3-4
50	Purdy Deposition, Page 54, Line 25
51	Purdy Deposition, Page 55, Lines 12-13
52	Purdy Deposition, Page 55, Line 21 through Page 56, Line 7
53	Purdy Deposition, Page 57, Line 5
54	Purdy Deposition, Page 57, Line 8
55	Purdy Deposition, Page 38, Line 11; Page 57, Line 10; Page 60, Line 1
56	Purdy Deposition, Page 59, Line 21
57	Purdy Deposition, Page 60, Lines 3, 5-7
58	Purdy Deposition, Page 61, Line 11
59	Purdy Deposition, Page 82, Line 7
60	Purdy Deposition, Page 82, Line 9
61	Purdy Deposition, Page 82, Line 11

62 Purdy Deposition, Page 82, Line 15

63 Purdy Deposition, Page 53, Lines 13, 18

64 Trial Testimony of Dr. Fred McCall-Perez; Deposition Testimony of McCall-Perez, Page 35

Dated at Sioux Falls, South Dakota, this _____ day of February, 1991.

CADWELL, SANFORD & DEIBERT

By _____
Douglas M. Deibert
120 North Phillips Avenue
P.O. Box 1157
Sioux Falls, South Dakota 57101

II.

That at all times material hereto the defendant, Bradley Alan Purdy, approximately twenty-three (23) years of age, resided with his parents, defendants Richard and Carolyn Purdy, at 3508 Cypress Court, Rapid City, Pennington County, South Dakota.

III.

That intermittently throughout the years 1982 through 1985, the minor plaintiffs were left in the care of the defendants at either the plaintiffs' residence or the defendants' residence, and the defendants assumed the care and supervision of the minor plaintiffs.

IV.

That it was the duty of the defendants to use due and reasonable care supervising and safeguarding the minor plaintiffs.

FIRST CAUSE OF ACTION

V.

Plaintiffs adopt by reference Paragraphs I through IV.

VI.

That on or about the aforementioned time periods, while the minor plaintiffs were placed in the care of the defendants, defendant Bradley Alan Purdy neglected and failed to use due and reasonable care in the supervision and care of the minor plaintiffs in that the defendant, negligently and without the intent to harm, touched and fondled the minor plaintiffs' persons in an indecent manner.

Supreme Court, U.S.
FILED
SEP 23 1992
OFFICE OF THE CLERK

NO. 92-206

IN THE

SUPREME COURT OF THE UNITED STATES
OF AMERICA

OCTOBER TERM, 1991

D.L. and J.L., and D.L. as
Guardian ad Litem for
C.L. and A.L., Minors,

Petitioners,

v.

AMERICAN FAMILY MUTUAL
INSURANCE COMPANY,

Respondent.

Petition for Writ of Certiorari to
the Supreme Court of South Dakota

REPLY TO BRIEF IN OPPOSITION

Donald P. Knudsen
Counsel of Record
for Petitioners
GUNDERSON, PALMER,
GOODSELL & NELSON
P.O. Box 8045
Rapid City, SD 57709
(605) 342-1078

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Henslee v. Union Planters Nat'l Bank & Trust Co., 355 U.S. 595, 69 S. Ct. 290 (1949)	7
Lujan v. Defenders of Wildlife, _____ U.S. _____, 112 S. Ct. 2130 (1992)	8
Stanley v. Illinois, 405 U.S. 645, 92 S. Ct. 1208 (1972)	9, 14
Vlandis v. Kline, 412 U.S. 441, 93 S. Ct. 2230 (1973)	9, 14
UNITED STATES DISTRICT COURTS:	
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STATE COURTS OF LAST RESORT:	
American Family Mutual Ins. Co. v. Purdy, 483 N.W.2d 197 (S.D. 1992)	PASSIM
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Rodriguez v. Williams, 729 P.2d 627 (Wash. 1986)	3
Tri-State Ins. Co. of Minnesota v. Bollinger, 476 N.W.2d 697 (S.D. 1991)	3

STATEMENT OF THE CASE

Petitioners take exception to respondent's statement that "The challenged decision of the South Dakota Supreme Court involved the interpretation of an exclusion in a liability insurance contract" (emphasis added). There was no issue before the Supreme Court of South Dakota regarding the meaning or construction of the language of the policy exclusion. Rather, the issue before the South Dakota Supreme Court was whether the policy's intentional injury exclusion applied under the facts of this case.

Petitioners also differ with respondent's statement that "This is not a case where a victim sustained an accidental physical injury . . ." The trial court entered a finding of fact that petitioners' injuries were not intended. Pet. App. 68. Therefore, the injuries were "accidental" in the sense that they were not intentional.

In the statement of facts contained in petitioners' Petition for Writ of Certiorari, which was accepted by respondent (see Brief of Respondent in Opposition to Petition for Writ of Certiorari, p. 1), the language of the pertinent policy exclusion and the applicable policy definitions are set forth. See Petition for Writ of Certiorari, p. 10-11. Briefly summarized, the policy excluded coverage for bodily injury which was expected or intended by an insured. "Insured" was defined as the person whose name appeared on the policy's declarations page as well as any insured's relatives that resided in the same household. Thus, as defined in the policy, the intentional injury exclusion would only apply if an insured (as opposed to any other person) intended or expected injury.

Precision as to the exact language of the exclusion on which American Family relies, as well as to the policy's definitions of terms used within the

exclusion, is crucial to understanding why respondent's arguments regarding the constitutionality of the Purdy decision are fundamentally flawed. Due to the policy's language and definitions, the insurance contract requires a subjective analysis of the insured's intentions or expectations rather than an objective analysis.[1]

---

[1]Respondent argues that South Dakota has adopted and objective approach to determining whether an insured expects injury, citing Western Casualty & Surety Co. v. Waisanen, 653 F. Supp. 825 (D.S.D. 1987). The Waisanen court was quoting a legal principle from an opinion of the Eighth Circuit Court of Appeals, however, not law established in South Dakota.

While respondent claims Waisanen was "quoted with apparent approval" in Tri-State Ins. Co. of Minnesota v. Bollinger, 476 N.W.2d 697, 701 (S.D. 1991), it was quoted for the principle that the "accidental" quality of an injury is determined by looking at the result, not by looking at the act which caused the result. Id.

South Dakota has never adopted an objective test for determining whether an insured expects injury to occur. To do so would violate the policy language, and the court is bound to abide by the language of the policy. Rodriguez v. Williams, 729 P.2d 627, 630 (Wash. 1986). Under the policy language in the case at bar, coverage would be excluded only if an insured expected injury. Thus, the policy language mandates a subjective analysis.

At the declaratory judgment trial, American Family bore the burden of proving by a preponderance of the evidence that an "insured" had intended or expected to injure the Lerback children. Under the facts of this case, Bradley Purdy was the only person who met the policy's definition of "insured."

American Family failed to carry its burden, however. Dr. Michael McGrath, American Family's expert who testified at the trial of the declaratory judgment action, testified on cross-examination:

> Q Had there been sufficient data available, it very well could have supported Dr. McCall Perez's conclusions, couldn't they?
>
> **MR. DIEBERT:** Objection. Speculation and conjecture.
>
> **THE COURT:** Overruled.
>
> THE WITNESS: I would expand upon that answer. That would help, yes.

Q. It could very well support Dr. McCall-Perez's conclusions, couldn't they?

A. Or refute it.

Q. But you don't know?

A. I don't know.

* * *

Q. It is possible -- you say that it is possible that Mr. Purdy did not intend to harm those victims at the time these acts occurred?

A. That is possible.

Q. And it is possible that he did not expect any harm to come?

A. That is possible.

* * *

CROSS EXAMINATION BY MR. SCHLAUGER:

Q. Dr. McGrath, I might have just one quick question, if I can just clear this up.

What Mr. Knudsen was asking you, again, it is very possible that Brad Purdy did not intend to harm the victims, is it not?

A. Very possible.

* * *

RECROSS EXAMINATION BY MR. KNUDSEN:

Q. Well, I don't recall at the end whether your answer was to the expectation question it is possible that Brad did not expect harm to occur, and I believe your answer was yes?

A. At this point, I don't think we can know what his expectations or intentions were, but it is equally possible he did or he didn't.

Pet. App. 52-54.

Thus, the record before the trial court contained Purdy's own testimony proclaiming that he did not intend or expect to injure the Lerback children. Pet. App. 1-2. It also contained the opinion of Dr. McCall-Perez consistent with Purdy's testimony. Pet. App. 26-31, 43. And the record contained the testimony of American Family's own expert stating that

it was very possible that Purdy had not intended or expected to injure Christian or Andrew Lerback. Pet. App. 53-54.[2]

There was no direct evidence to the contrary. In other words, American Family presented the trial court with no direct proof that Purdy did intend or expect injury. Rather, American Family attempted to meet its burden of proof by presenting circumstantial evidence of intent or expectation. The trial court, however, was

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[2]For respondent to argue that such scientific evidence flies in the face of reason and common sense impeaches the credibility of American Family's own expert witness. Dr. McGrath, American Family's witness, testified that it was very possible Purdy did not intend or expect injury to the Lerback children. Pet. App. 53.

At one time it also flew in the face of reason and common sense to believe that the earth was round, that the earth revolved around the sun, or that man could fly. Enlightened people now embrace what was once deemed heresy.

"Wisdom too often never comes, and so one ought not to reject it merely because it comes late." Henslee v. Union Planters Nat'l Bank & Trust Co., 355 U.S. 595, 600, 69 S. Ct. 290, 293 (1949)(Frankfurter, J., dissenting).

not convinced that Purdy intended or expected injury. Pet. App. 59-60.

ARGUMENT

I. STANDING.

Respondent argues that petitioners lack standing to request review because petitioners allegedly cannot establish that a favorable decision by the Supreme Court of the United States would redress their injury. Respondent's objection based on standing is flawed, however, because petitioners were the object of the unconstitutional action and a favorable decision would cure the unconstitutional deprivation.

There is little question that a favorable decision will redress an injury when a party invoking federal court jurisdiction is an object of the allegedly unconstitutional action. Lujan v. Defenders of Wildlife, _____ U.S. _____, 112 S. Ct. 2130, 2137 (1992).

In this case, petitioners were the object of the unconstitutional action. The

opinion by the Supreme Court of South Dakota creates an irrebuttable presumption which deprives petitioners of property without due process of law under circumstances where reasonable alternative means exist to make the determination which is irrebuttably presumed. Decisions by the Supreme Court of the United States establish the aforementioned combination of factors unconstitutionally violates the due process clauses of the United States Constitution. Vlandis v. Kline, 412 U.S. 441 (1973); Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974); Stanley v. Illinois, 405 U.S. 645 (1972).

A reversal of the Purdy decision would redress petitioners' injuries by assuring that petitioners would enjoy the constitutionally guaranteed safeguards of due process, equal protection, and the constitutional proscription against impairment of contracts.

Because a favorable decision by the United States Supreme Court would redress

petitioners' injuries, petitioners have standing to invoke this court's jurisdiction.

II. ADEQUATE AND INDEPENDENT STATE LAW BASIS.

Respondent argues that this court should not review the Purdy decision because there allegedly exists an adequate and independent state law basis for the challenged decision. The sole basis for the Supreme Court of South Dakota's decision, however, is abundantly clear:

> Although the trial court's analysis is correct under our summary judgment cases, [citations omitted], we carve an exception to this general rule for criminal sexual contact cases and infer as a matter of law that harm was expected or intended . . . We hold these acts of criminal sexual contact are of such a nature that the intention or expectation to inflict bodily injury will be inferred as a matter of law. The exclusion for bodily injury either "expected or intended" in this policy applies to these facts. Since the exclusion applies, there is no coverage under the policy and American Family has no duty to defend Purdy in the underlying action. We reverse the trial court's denial of summary judgment.

Purdy, 483 N.W.2d at 201 (emphasis added). The court's language unequivocally

establishes that its decision was bottomed on the newly-created exception applied to criminal sexual contact cases. That exception established an unconstitutional irrebuttable presumption that in all cases of criminal sexual contact, the perpetrator intends or expects to injure the victim.

The court's opinion provides no other "adequate and independent ground under state law for the challenged decision." The sole ground for the decision was the irrebuttably presumed fact that Purdy intended or expected injury. Once that determination was reached by means of the presumption, the application of the intentional-injury exclusion was a mere formality. There could be no other conclusion -- coverage was excluded.

At this point, petitioners feel compelled to point out two grave misstatements contained in respondent's brief. First, at pages 19-20 of Brief of Respondent in Opposition to Petition for Writ of Certiorari, respondent states that

the South Dakota Supreme Court characterized the testimony by Dr. McCall-Perez (petitioners' expert witness who testified that Purdy did not intend or expect injury) as "fl[ying] in the face of all reason, common sense, and experience." Purdy, however, contained no such description of the Dr. McCall-Perez's expert testimony.

American Family cites to Purdy, 483 N.W.2d at 199 as the location within the opinion where this alleged criticism appears. The only place where those words appear on page 199 of the Purdy decision is where the court was quoting language from the case of CNA Ins. Co. v. McGinnis, 282 Ark. 90, 666 S.W.2d 689, 691 (1984). The South Dakota Supreme Court quoted the Arkansas Supreme Court's characterization of the perpetrator's (not an expert witness's) testimony.

The Supreme Court of South Dakota did not ridicule Dr. McCall-Perez's testimony in any way. Thus, for respondent to claim

that the South Dakota Supreme Court was referring to the testimony of Dr. McCall-Perez when quoting the aforementioned language has absolutely no basis in fact.

Second, respondent states that the testimony of Dr. McCall-Perez is directly contradicted by Purdy's own deposition testimony with respect to Purdy's intent to injure or expectation of injury. See Brief of Respondent in Opposition to Petition for Writ of Certiorari, p. 20. Once again, this a misstatement of the record.

Nowhere in Purdy's deposition does Purdy state that he intended to injure the Lerback children. Nowhere in Purdy's deposition does he testify that he expected that the children would be injured. In fact, Purdy's testimony is to the contrary. Purdy testified that he did not intend to injure the Lerback children. Pet. App. 1-2. Purdy testified that he did not expect the children would be injured. Id. Dr. McCall-Perez's opinion is perfectly

consistent with Purdy's testimony. Pet. App. 9-11, 25-46.

The remainder of respondent's brief goes to the merits of the issues that would be briefed once this court issues a writ of certiorari. Therefore, as it would be premature to argue those issues at this stage of the proceedings, petitioners will defer arguing the merits of the constitutional issues at this time. This deferral should not, however, be construed as any type of concession to respondent's arguments on the merits.

As established by the petition for writ of certiorari, a writ should be issued to review the Purdy decision because it is contrary to applicable decisions of the Supreme Court of the United States. Vlandis, 412 U.S. 441, 93 S. Ct. 2230 (1973); Stanley, 405 U.S. 645, 92 S. Ct. 1208 (1972); and LaFleur, 414 U.S. 632, 94 S. Ct. 791 (1974). Because Purdy and state and federal court decisions from no less than 25 jurisdictions contain

unconstitutional holdings inconsistent with United States Supreme Court precedent, this court should issue a writ of certiorari to review the Purdy decision and issue an opinion correcting the constitutional violations Purdy contains.

Alternatively and as further support for issuing a writ of certiorari, Purdy should be reviewed because it decides important questions of federal law involving due process, equal protection, and impairment of contracts, which have not been but should be settled by the Supreme Court of the United States. Because the same constitutional errors have been and continue to be made in both state and federal courts throughout the United States, review is necessary to ensure compliance with constitutional mandates.

CONCLUSION

Respondent's objection to issuance of a writ of certiorari based on alleged lack of standing is without merit because a favorable decision by this court will

redress petitioners' injuries. It will protect petitioners' constitutionally guaranteed rights of due process, equal protection, and will prohibit the Supreme Court of South Dakota from impairing the obligations of the insurance contract.

Respondent's objection based on alleged adequate and independent state-law basis for the decision is also without merit. The only basis for the Purdy decision was the creation of the unconstitutional irrebuttable presumption, and the application of that presumption of the facts. The sole basis for the decision was unconstitutional and requires reversal.

The ironic consequence of court opinions which presume an insured's intent to harm or expectation of injury in all cases of criminal sexual contact is that the innocent victim of the crime -- the blameless child -- is denied a source of compensation for the grievous injuries inflicted by the abuse.

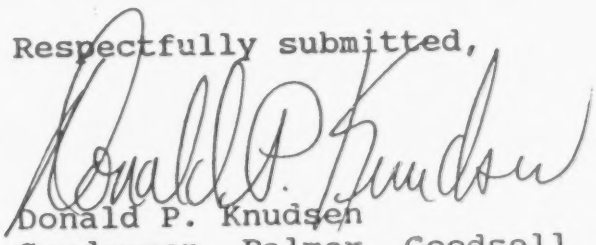
Without such compensation and without the treatment which compensation could make possible, there is a chance that the victim may go on to become an offender himself. Public policy is best served by rational decisions founded in fact rather than by the creation of an irrebuttable presumption which is not necessarily true and which operates to deprive much-needed compensation to innocent victims of sexual abuse.

Issuance of a writ of certiorari and reversal of the Purdy decision would cause courts to provide that which is constitutionally required -- a fair hearing on the issue of an insured's intentions and expectations -- before an insurance company could avoid its contractual obligations on the basis of an intentional-injury exclusion. Such a decision would be consistent with reason, common sense and logic: it would recognize that all humans do not think alike and that due to some mental disease or defect, some people may

commit a crime without intending or expecting injury.

For all of the reasons stated above, petitioners respectfully petition the Supreme Court of the United States to issue a writ of certiorari to the Supreme Court of South Dakota to review the Purdy decision.

Respectfully submitted,



Donald P. Knudsen
Gunderson, Palmer, Goodsell
& Nelson
P.O. Box 8045
Rapid City, SD 57709-8045
(605) 342-1078